IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1926.

No. 196.

Hyman M. Zahn and A. W. Ross,
Plaintiffs in Error,
vs.
Board of Public Works of the City of Los Angeles, Charles H. Treat, Keith McGuire and E. J. Delorey,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Notice of Motion and Motion to Advance Cause on Calendar.

HILL, MORGAN & BLEDSOE,
A. J. HILL, ESQ.,
Attorneys for Plaintiffs in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1926.

No. 196.

Hector N. Zahn and A. W. Ross,
Plaintiffs in Error,

vs.

Board of Public Works of the City of Los Angeles, Charles H. Treat. Hugh McGuire and E. J. Delorey. etc.,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Notice of Intention to Move for an Order Advancing Cause on Calendar.

To the Above Named Defendants in Error, and to Jess E Stephens, Esq., City Attorney, and Lucius P. Green, Esq., Assistant City Attorney, of the City of Los Angeles, Their Attorneys:

You, and each of you, will please take notice that the plaintiffs in error in the above entitled cause, through

their attorneys and counsel, will, on the 4th day of October, 1926, in the Supreme Court of the United States, at the court room in Washington, D. C., at the opening of court on said date, or as soon thereafter as counsel may be heard, move said court for an order advancing the date for the hearing and oral argument of said cause before said court to an early date on the calendar of said court, preferably to the date on which the hearing is had and oral argument presented in that certain cause now pending before said court entitled: "Village of Euclid, Ohio, and Harry W. Stein, Inspector of Buildings for the Village of Euclid, appellants, v. The Ambler Realty Company, appellee" being case No. 31 on the October Term, 1926.

That attached hereto, made a part hereof and served herewith is a motion of the said appellants in error for said order, together with a brief statement of the matters involved and the reasons supporting said motion.

HILL, MORGAN & BLEDSOE,
A. J. HILL, ESQ.,
Attorneys for Plaintiffs in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1926.

No. 196.

Hector N. Zahn and A. W. Ross,
Plaintiffs in Error,

vs.

Board of Public Works of the City of Los Angeles, Charles H. Treat. Hugh McGuire and E. J. Delorey. etc.,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Motion to Advance Cause.

Come now Hector N. Zahn and A. W. Ross, plaintiffs in error, through their attorneys, Hill, Morgan & Bledsoe and A. J. Hill, Esq., and move the court for an order advancing said cause to an early date during the October term, 1926, preferably to the date on which that certain cause entitled "Village of Euclid, Ohio, and Harry W. Stein, Inspector of Buildings for the Village of Euclid,

appellants, v. The Ambler Realty Company, appellee", being case No. 31 on the October term, 1926, is heard, or oral argument in said cause presented to this court.

That a brief statement of the matters involved in said causes and each of them and the reasons supporting this motion, are as follows:

That each of the above named causes involve precisely the same question of law, to-wit, whether or not municipalities may validly enact, under the Police Power, a zoning ordinance whereby the lawful, innocuous and inoffensive use of private property is restricted and prohibited without compensation and without due or any process of law.

That it would further be to the advantage of the court to have said causes heard on the same date, not only because the issues of law involved are identical, but because of the further fact that the question above referred to presented for decision are of great importance to a large number of municipalities and other public bodies, as well as thousands of individual property owners in almost every state in the United States, and it is felt that the briefs filed and the oral argument to be presented in both causes may be of some assistance to the court in the determination of each.

Respectfully submitted,

HILL, MORGAN & BLEDSOE,

A. J. HILL, ESQ., and

.....

Attorneys for Plaintiffs in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1926.

No. 196.

Hector N. Zahn and A. W. Ross,
Plaintiffs in Error,
vs.
Board of Public Works of the City of Los Angeles, Charles H. Treat, Hugh McGuire and E. J. Delorey, etc.,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief and Argument for Plaintiffs in Error.

HILL, MORGAN & BLEDSOE,
By A. J. HILL,
Attorneys for Plaintiffs in Error.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF CASES.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1926.

No. 196.

Hector N. Zahn and A. W. Ross,
Plaintiffs in Error,
vs.
Board of Public Works of the City of Los Angeles, Charles H. Treat, Hugh McGuire and E. J. Delorey, etc.,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

Brief and Argument for Plaintiffs in Error.

The opinion of the Supreme Court of California in this case has not yet been officially reported in the California reports, but appears in 69 Cal. Dec. (Advance Sheets) 228, and in 234 Pac. 388.

Jurisdiction.

No question was raised as to the jurisdiction of the Supreme Court of California to entertain this action as an original proceeding for a writ of mandate and no question has been raised as to the jurisdiction of this court to review the proceedings of the Supreme Court of California on writ of error. The jurisdiction of the Supreme Court of the state of California rests upon the fact that the petition for the writ of mandate alleged that the defendants in error failed and refused to perform a duty imposed upon them by law, to-wit, the issuance of a permit for the construction of a certain building on the property of petitioners irrespective of the provisions of certain ordinances, to-wit, Ordinance No. 42,666 (New Series), (so called "Zoning Ordinance") of the City of Los Angeles, and Ordinance No. 46,250 (New Series), (so called "Setback Ordinance") of said city, which said ordinances are alleged to be invalid, null and void insofar as petitioners' property is concerned because the same are in violation of the Constitution of the United States and the Constitution of the state of California in that said ordinances amount to a taking and damaging of property of the petitioners without just compensation being made therefor, and amount to a taking and deprivation of the property of said petitioners without due process of law and deny to petitioners the equal protection of the law and that said ordinances are further invalid, null and void in that the same are unreasonable, unjust, discriminatory and wholly lacking in uniformity, and that said ordinances constitute an unlawful exercise by the City of Los Angeles of its police powers.

The Supreme Court held that Ordinance No. 42,666 (N. S.) was valid and that it was not necessary to determine the validity of Ordinance No. 46,250 (N. S.)

The judgment of the Supreme Court of California [R. pp. 54-70], was dated February 27, 1925 [R. p. 72], and thereafter a petition for rehearing filed in behalf of plaintiffs in error was on the 26th day of March, 1925, denied, [R. p. 70]. The petition for a writ of error to this court was filed June 18, 1925 [R. p. 72], and allowed on the same day [R. p. 73]. The writ of error directed from this court to the Supreme Court of the state of California was perfected under Sec. 237 of the Judicial Code, 36 Stat. at L. 1156, the judgment of the Supreme Court of the state of California being a final judgment in the highest court of the state of California in which a decision in the suit could be had, in which suit there was drawn in question the validity of a statute and an authority exercised under the state of California on the ground of their being repugnant to the Constitution of the United States and the decision in such suit was in favor of the validity of such statute and authority.

That the ordinances of the City of Los Angeles and that the authority purported to be exercised under such ordinances and in respect to the passing of the same, was an authority exercised under the state of California, and that this court has jurisdiction on writ of error to the Supreme Court of the state of California in these proceedings is established in *American Express Company v. Michigan,* 177 U. S. 406, 44 L. Ed. 824, 20 Sup. Ct. Rep. 695; *Yick Wo v. Hopkins,* 118 U. S. 356, 30 L. Ed. 220; *Home Telephone and Telegraph Company v. Los Angeles,* 227 U. S. 278, 57 L. Ed. 510.

Statement of the Case.

The plaintiffs in error filed an original petition for mandate in the Supreme Court of the state of California seeking to require the defendants in error to issue to plaintiffs in error a permit to construct a certain building suitable for occupation by stores on property belonging to plaintiffs in error in the City of Los Angeles. An alternative writ was issued made returnable in the District Court of Appeal, which court found in favor of plaintiff, holding the ordinances unreasonable and discriminatory. A petition for hearing in Supreme Court was granted and ultimately the decision of the District Court of Appeal reversed and the ordinances upheld.

The District Court of Appeal, while the matter was pending before it, and in aid of its better and proper understanding of the controversy, appointed its referee to take evidence and report to it the facts involved. This unchallenged report of the referee is incorporated in the record herein and to it we refer in the following citations.

The property of plaintiffs in error is located on the south side of Wilshire boulevard between two streets known as Dunsmuir avenue and Cochran street, which last named street is also known as Cahuenga and Ballona Road and designated on the map introduced as petitioners' Exhibit "B", being part 7 of the zoning map of Los Angeles, [R. side fol. p. 28] and comprises all of the property in that block between said streets. Cochran street is the third street west from La Brea street which intersects Wilshire Boulevard at approximately right angles. Wilshire Boulevard is a main thor-

oughfare or artery extending from Westlake Park in the westerly section of the City of Los Angeles, to and through a large portion of the county of Los Angeles and several other municipalities to the Pacific Ocean at the City of Santa Monica. It is a wide and main artery upon which a tremendous amount of vehicular traffic of every description exists during all of the day and most of the night. [R. p. 45.] As the result of which there is great confusion, congestion and noise in front of the property of plaintiffs in error and for long distances in either direction from said property. The property on Wilshire boulevard from Westlake Park westward, a distance of about two miles or so, was, years ago, built up to exclusive high-class residences, but during the past few years a decided change has come about by the introduction of business in the shape of rooming houses, boarding houses, hotels, with shops and stores, restaurants, and at certain intersection points, well defined business centers. Many of the exclusive residences are no longer occupied for residence purposes but are now being used for business. [R. p. 52.]

At the time of the adoption of Ordinance No. 42666 (N. S.) hereinafter referred to, Wilshire boulevard, from what is known as Rimpau street to the city limits, a distance of between two or three miles westward, was partially improved, but there were no hotels, apartment houses, residences or other structures of any kind and character permitted in what is defined in said ordinance as "B" zone. At that time there were, from Rimpau street to the city limits on Wilshire boulevard, a number of real estate offices, a few stores used by mercantile

establishments, but no residences or other buildings whatsoever. [R. p. 46.] Although this ordinance had been in effect for nearly two years at the time of the filing of the petition herein, no additional buildings *of any character* had been built during this period upon Wilshire boulevard westward from Rimpau street to the city limits, with the exception of a single business structure at the corner of La Brea avenue and Wilshire boulevard [R. p. 46], where, for a block in either direction, Wilshire has been set apart as a business center, that is to say, the property there located placed in Zone "C". [See Exh. "B", side folio p. 28.] The property of plaintiffs in error lies in the center of this section of Wilshire and is three blocks westward from the intersection of La Brea and Wilshire boulevard, and within two blocks of the property zoned for business purposes at that intersection. Along Wilshire boulevard, within one mile in either direction from plaintiff's in error property, there is not located a single structure of any kind permissible under "B" zone of the existing ordinance. Westward from Rimpau street on the south side of Wilshire, the property, to within a distance of three blocks eastward from La Brea, has been restricted in the deeds heretofore for a period of years by subdividers to use for residences only. [R. p. 44.] From this point westward, a distance of more than a mile, or to be exact, a distance of fourteen city blocks, there are no restrictions which would prevent the use of the property for business purposes, except the provisions of the zoning ordinance. [R. p 44.] The property of plaintiffs in error lies near the center of this unrestricted territory.

On the north side of Wilshire, the property from Wilshire boulevard west from Rimpau street to within a block of La Brea, a distance of about three-quarters of a mile, is restricted by deed for a period of years against use for business purposes. [R. p. 44.] Westward from this point, with the exception of two blocks where the property is also unrestricted, the balance of the property for a distance of more than two miles on the north side of Wilshire was at the time of the adoption of the ordinance unsubdivided and still is unrestricted, being open to use for business purposes except for the provisions of the zoning ordinance. [R. p. 44.] The tract in which the property of plaintiffs in error is located was subdivided and placed upon the market before the territory in that locality became a part of the city of Los Angeles, and this tract and other tracts of land in that locality were subdivided and sold as business property. [R. p. 43.] After annexation, and for a period of about six months, this property continued to be legally available for and sold in the open market as business property, and to some extent built up with buildings used for business purposes. [R. p. 45.] For example, upon the property of plaintiffs in error is located a real estate office, and directly across the street is a brick store building occupied by a grocery store and a market. [R. p. 46.] Thereafter, the ordinances in question were adopted, placing all of Wilshire boulevard west of Rimpau in what is designated in the ordinances as "B" zone, where only residences, hotels, lodging houses, tenements, churches, private clubs, public or semi-public institutions of a philanthropic or eleemosynary nature, railroad pas-

senger stations and the usual accessories located on the same lot or parcel of land with any of said buildings, including the office of a physician or dentist, and private garages may be erected. [R. p. 49; p. 37 of Exh. A, side folio p. 27-A.] The ordinance places all of the property on Wilshire boulevard westward from Rimpau street in Zone "B" with the exception of two blocks at the intersection of La Brea. These excepted two blocks are placed in Zone "C". La Brea avenue is a dedicated street running in a generally northerly and southerly direction intersecting Wilshire boulevard at approximately right angles. Commencing northerly from Wilshire it extends as an improved street about three blocks south of Wilshire boulevard, where it ceases to be passable. [R. p. 47.] Pico street is a street running practically parallel with Wilshire boulevard about three-fourths mile to the south thereof and westward from Rimpau street it traverses much the same nature of property as that traversed by Wilshire boulevard except that the property fronting on Pico is lower in elevation than that fronting on Wilshire boulevard, and there were at the time of the adoption of the ordinance, fewer business houses along Pico westward from Rimpau and more residences than upon the property fronting upon Wilshire boulevard. [R. p. 51.] All of Pico westward from Rimpau is placed within "C" zone and the property fronting thereon open to business. [R. p. 52.] The general territory traversed by Wilshire, as well as by Pico, lies in that portion of the City of Los Angeles, where, until recently, there was but little improvement, but where, within the past

few years, there has been a great growth and a rapid development on every street except Wilshire boulevard. [R. p. 52.]

The referee found, in addition to the facts above, that the property of plaintiffs in error would have a market value of from 100% to 200% greater than it has today, were it not restricted by the provisions of the zoning ordinances. [R. p. 46.] With the exception of a few real estate offices none of the buildings on Wilshire located on property westward from Rimpau conform to the 15-foot setback line established by ordinance No. 46250 (N. S.) [R. p. 47]. The referee further found that the property of plaintiffs in error is as well adapted to business purposes and uses as is the said property along La Brea street which under the ordinance is zoned for business.

That in brief describes the property of plaintiffs in error and the surrounding property.

On October 18th, 1921, the City of Los Angeles adopted an ordinance, known as Ordinance No. 42666 (N. S.), which, from time to time, has been amended by various other ordinances, but for the sake of convenience, the entire ordinance as amended up to the time of the filing of the petition herein will be referred to as Ordinance No. 42666 (N. S.). This is the so-called "Zoning Ordinance" which divides the City of Los Angeles into five zones and prescribes the classes of buildings, structures and improvements in the several zones and the use thereof.

In Zone "A" (being the white portion shown on the map, Exhibit "B" to the petition for mandamus) [R. side

folio p. 28], no building, structure or improvement may be erected which is designed or intended to be occupied or used for any purpose other than a single family dwelling.

In Zone "B" (being the shaded portions on the map) [R. side folio p. 28], no building may be erected which is designed or intended to be used or occupied for any purpose other than dwellings, tenements, hotels, lodging or boarding houses, churches, private clubs, public or semi-public institutions of an educational, philanthropic or eleemosynary nature, railroad passenger station and the usual accessories, including the office of a physician or dentist, and private garages.

In Zone "C" (appearing in black on the map) [R. side folio p. 28] no building can be erected which is designed to be occupied or used for any purpose other than a store or shop for the conduct of a wholesale or retail business, place of amusement, an office or offices, studios, conservatories, dancing academies, hospitals, commercial garages and other innocuous and harmless business, or for the uses and purposes permitted in "A" or "B" zone. In "D" zone manufacturing establishments are permitted, a long list of the specific trades or industries being enumerated. Any of the uses set forth in "A" or "B" or "C" zone are also permitted in "D" zone. In Zone "E" any use is permitted which is not prohibited by law or ordinance, that is to say, Zone "E" is the unrestricted zone.

On September 21, 1922, and subsequent to the annexation of that territory in which the property of plaintiffs in error is located, the City Council adopted District

Map No. 7, appearing as Exhibit "B" to the petition for mandamus [R. side folio p. 28], by Ordinance No. 44668 (N. S.), which placed the property of plaintiffs in error, and all property on Wilshire boulevard westerly of Detroit street, and to a point beyond Gennessee street, in Zone "B". Zone "B" is shown on the map as the shaded portion, Zone "A" the unshaded portion and Zone "C" the black portion. Prior to the adoption of this ordinance the matter had been referred to the City Planning Commission and on the 7th day of August, 1922, the plaintiffs in error, together with other property owners, protested against the placing of property fronting on Wilshire boulevard in "B" zone. These protests were referred to the City Planning Commission, and G. Gordon Whitnall, the secretary thereof, caused Messrs. Cook & Hall, landscape architects, to send a communication to the City Council, which said communication appears as Exhibit "C" to the petition for mandamus. [R. p. 21.] A communication was also sent to the City Council in like manner from the Community Development Association, appearing as Exhibit "D" to the petition for mandamus. [R. pp. 22, 23.] The protests of the property owners, however, were denied and the property placed in Zone "B". [R. pp. 49-51.]

Subsequent thereto, plaintiffs in error applied to the City Council requesting said City Council, pursuant to section 4 of said ordinance [R. side folio p. 27-a, at p. 36 thereof], to declare an exception to the restrictions of said ordinance in respect to their property and to adopt an ordinance permitting petitioners to erect a business building thereon. Said matter was referred to the Pub-

lic Welfare Commission of the Council, which said commission reported that inasmuch as Wilshire boulevard was *"destined to become a show street and the encroachment of business would be a great detriment to future residential development,"* that the application be denied, and pursuant thereto, said application was denied by said City Council. [R. p. 48.]

On the 18th day of May, 1923, the City Council of the City of Los Angeles adopted a certain ordinance known as Ordinance No. 46250 (N. S.) and entitled "An ordinance ordering the establishment of a setback line on Wilshire boulevard between Bronson avenue and the west city boundary of the City of Los Angeles", which said ordinance required that all buildings and structures on property having a frontage on Wilshire boulevard between Bronson avenue and the west city boundary line, be set back a minimum distance of 15 feet from the street line of said boulevard. The property of plaintiffs in error is also affected by this ordinance in that it is property fronting on Wilshire boulevard between Bronson avenue and the west city boundary line of the west City of Los Angeles. [R. pp. 6 and 42.]

Thereafter petitioners instituted this action seeking a writ of mandamus from the Supreme Court of the state of California directing and ordering the defendants in error to issue to them a permit for the construction of the building proposed to be erected upon their property by plaintiffs in error, which said building, as aforesaid, is a building designed and intended to be used for purposes and uses permitted in Zone "C", but not for the purposes or uses permitted in Zones "A" or "B".

It is admitted that the plaintiffs in error have done all things required of them to be done under the ordinances of the City of Los Angeles prior to the issuance of such permit, except that said plans and specifications do not comply with the provisions of Ordinance No. 46250, in that said building is not to be constructed 15 feet from the street line of Wilshire boulevard and that said building is to be used for innocuous and harmless purposes but other than those permitted in Zone "B" as defined in Ordinance No. 42666 (N. S.) and amendments thereof as heretofore described.

In their petition, plaintiffs in error allege that said ordinances are in violation of the terms and provisions of section 14, article I, of the Constitution of the state of California and the 5th and 14th amendments to the Constitution of the United States, in that said ordinances amount to a taking and damaging of property without just compensation and that said ordinances deprive petitioners of their property and the use of their property, without due process of law, and denies to petitioners equal protection of the law, and that said ordinances are unreasonable, unjust, discriminatory and wholly lacking in uniformity and that said ordinances constitute an unlawful exercise by the City of Los Angeles of its police powers in that said ordinances are not necessary for the preservation of the public peace, health, safety, morals, welfare or convenience, and that said Ordinance No. 42666 (N. S.) is further invalid in that it purports to confer upon the City Council of the City of Los Angeles the right to permit the erection in any of the zones, of structures or improvements, whether permitted

by said ordinances in said zone or not, whenever, in the opinion of the City Council, it is necessary for the preservation or enjoyment of any substantial property rights.

Specification of Errors Intended to Be Urged.

I.

That the Supreme Court of the State of California erred in holding and deciding that the provisions of Ordinance No. 42666 (N. S.) of the City of Los Angeles as amended by Ordinance No. 44668 (N. S.) of said city were and are valid exercises of the police power and were and are constitutional and were not in violation of the provisions of the Constitution of the United States prohibiting the taking of property without due process of law and were not violative of the 14th amendment of the Constitution and were not obnoxious to any provision of the State or Federal Constitutions and in particular to the 14th amendment to the Constitution of the United States.

II.

That the Supreme Court of the State of California erred in holding and deciding that under the findings of the referee the restrictions and prohibitions placed upon the property of plaintiffs in error by said ordinances were reasonable and not discriminatory and were, under the particular facts and findings aforesaid, a valid exercise of the police power and were and are constitutional and not in violation of the Constitution of the State of California and of the Constitution of the United States and in particular the 14th amendment thereto, and that

said restrictions and prohibitions did not discriminate against plaintiffs in error and did not deny to these plaintiffs in error the equal protection of the law, contrary to the provisions of the 14th amendment to the Constitution of the United States.

III.

That the Supreme Court of the State of California erred in not holding and declaring that Ordinance No. 46250 (N. S.) of said City of Los Angeles providing for the establishment of a setback line on Wilshire boulevard between Bronson avenue and the west city boundary of the City of Los Angeles and requiring that buildings erected upon such street within the limits defined be erected 15 feet from the street line thereof, was unconstitutional and void and violative of the provisions of the 14th amendment to the Constitution of the United States.

The Questions to Be Decided.

I.

Whether a city may divide its territory into zones and prohibit in certain of such zones, uses of property which are not in any way harmful and cannot be classified as uses which constitute nuisances *per se* or which may become nuisances because of the manner in which they are conducted.

II.

Assuming that the city has such power, whether or not the City of Los Angeles unjustly discriminated against

the plaintiffs in error and their property under the facts established in this case by prohibiting plaintiffs in error to use their property for business purposes, which said business was not a nuisance *per se* or one which was likely to become such nuisance.

III.

Whether or not a city may prohibit the erection or maintenance of a building within a prescribed distance of the street line of the lot upon which said building is erected or to be erected.

ARGUMENT.

I.

That the Enactment of Ordinance No. 42666 (N. S.) as Amended by Ordinance No. 42668 (N. S.), Dividing the City of Los Angeles Into Zones, and Restricting Private Property Therein Against the Construction or Use of Buildings for Business Purposes, Without Regard to Character or Nature of the Business or the Manner in Which It Is Conducted or Is to Be Conducted, Is an Unlawful Exercise of the Police Power and a Taking of Property Without Due Process of Law in Violation of the 14th Amendment to the Constitution of the United States.

At the outset it will be well to note that we may, in the present case, deal only with the legal aspects of the questions involved, and not with the sociological or economic theories which might be advanced as purporting to demonstrate the beneficial results to be attained

by legislation of this character. It may be that a communistic form of government would bring great benefits, and that communal control of all uses of property would promote to the greatest degree our welfare and well-being, and, as an abstract theory it might, as a matter of economics, conserve in an ideal manner the resources of the state. By it the social well being of society might be preserved, and the governing bodies of the state, by reason of the infinite wisdom of the members thereof, might, in a manner heretofore unknown to the human race, because of its innate infirmities, fix and determine what uses of property in certain localities would be most beneficial to the people as a whole. But with all these matters we have no concern, as our government is not communistic in its ideals or principles, although it is true that some well-meaning citizens have visualized a theoretical ideal, arising from what is termed an orderly, comprehensive and carefully considered segregation of property as to all uses, upon the assumed premise that our legislative bodies may foreordain and predetermine the growth and development of the community.

Therefore the question which is presented to this court to determine is not whether all this will be beneficial, or even highly desirable, but is whether the communal control of private property involved in zoning, is a proper exercise of the powers of state government under the restrictions and inhibitions of the Constitution of the United States.

Briefly stated, we have a case where a state agency, the City of Los Angeles, has declared that private property may not be used by the owner for any purpose he pleases, and that no matter how inoffensive the use may be, if his property is not located in a certain district,

he may not devote it to a desired though inoffensive use. If this power may be sustained at all, it must be under the police power. As admitted in the opinion of the Supreme Court of California in the case of *Miller v. Board of Public Works of the City of Los Angeles*, 69 C. D. 215, 234 Pac. 381, a companion case, referred to in the opinion in this action, the ordinance here in question is prohibitory in its nature and the prohibition is absolute. And as is also admitted in that decision, the sole question is whether or not such power is properly referable to the police power. The Supreme Court of California sustained the ordinance on the ground that it protected and promoted the civic and social values of the American home. It held that:

> "In addition to all that has been said in support of the constitutionality of residential zoning as part of a comprehensive plan, we think it may be safely and sensibly said that justification for residential zoning may, in the last analysis, be rested upon the protection of the civic and social values of the American home. *The establishment of such districts is for the general welfare because it tends to promote and perpetuate the American home.* It is axiomatic that the welfare, and indeed the very existence of a nation depends upon the character and caliber of its citizenry. The character and quality of manhood and womanhood are in a large measure the result of home environment. The home and its intrinsic influences are the very foundation of good citizenship and any factor contributing to the establishment of homes and the fostering of home life doubtless tends to the enhancement not only of community life but of the life of the nation as a whole." (Italics ours.)

See, also, the opinion in this case [R. p. 57].

The police power has been variously defined. Perhaps one of the broadest definitions which has been given is found in the case of *Chicago, B. & Q. R. R. Co. v. Illinois ex rel. Grimwood*, 200 U. S. 561, 26 Sup. St. Rep. 341, 50 L. Ed. 596, where the court stated, through Mr. Justice Harlan, that:

> "We hold that the police power of a state embraces regulations designed to promote the public convenience or the general prosperity as well as regulations designed to promote the public health, the public morals or the public safety."

But the police power is not an absolute power. All powers under our constitutional form of government must be exercised in subordination to the limitations and inhibitions placed upon that government by the Constitution. Thus the police power must be exercised in subordination to the provisions of the 14th Amendment, which expressly prohibits the states from depriving persons of their life, liberty or property without due process of law. As stated by Mr. Justice Peckham, speaking for the court in the case of *Lockner v. New York*, 198 U. S. 45, 49 L. Ed. 937, 25 Sup. Court Rep. 539:

> "It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the state would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health or the safety of the people; such legislation would be valid, no

matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext,—become another and elusive name for the supreme sovereignty of the state, to be exercised free from constitutional restraint."

See also:

Adkins v. Children's Hospital, 261 U. S. 525, 67 L. Ed. 785;

Eubank v. Richmond, 226 U. S. 143, 33 Sup. Ct. Rep. 77, 57 L. Ed. 156;

Coppage v. Kansas, 236 U. S. 1, 35 Sup. Ct. Rep. 240, 59 L. Ed. 441;

Meyer v. State of Nebraska, 262 U. S. 390, 67 L. Ed. 1042.

It is admitted in the present case that petitioners in error do not desire to erect a building for the purpose of conducting therein a business which is a nuisance *per se,* or one which is likely to become such. Petitioners in error seek to erect a building for use as retail stores and other inoffensive business. We admit that the police power may be exercised to prohibit nuisances or uses of property which are likely to become nuisances under the maxim *sic utere tuo, ut alienum non laedas,* and that the constitutional protection of private property does not authorize nor permit the owner of property to use it in a manner which is or may become offensive, injurious or dangerous to his neighbors. The maxim, *sic utere tuo, ut alienum non laedas,* comprehends a regulatory rule as distinguished from a confiscatory rule. *The general welfare of the public, in the sense of meaning that which is beneficial, useful or desirable to the*

public as distinguished from that which is necessary for the protection of the public, is not a sufficient basis for the exercise of the police power. If rights may be taken under the police power solely for the benefit of the public, and thereby public welfare be advanced and promoted, though not necessarily protected, then the constitutional protection of property becomes a snare and a delusion; the police power becomes a doctrine of a sovereignty in which all possible and conceivable powers may be exercised by the state without restriction, and the constitutional limitation upon taking property for public use or for public benefit without just compensation becomes a wholly meaningless and useless restriction.

Pennsylvania Coal Co. v. Mahon, 260 U. S. 393, 67 L. Ed. 322;

Ambler Realty Co. v. Village of Euclid, 297 Fed. 307.

If our constitutional inhibitions and restrictions are unwise, there is a constitutional method for effecting a change, and we feel that this method should be followed. That is to say, if the prevailing and preponderating sentiment adverted to by the court in the case of *Miller v. Board of Public Works, supra*, requires a lifting of the restrictions and inhibitions of the Constitution, then that should be accomplished by a change in the provisions of the Constitution which would otherwise prohibit the desired legislation. In that way alone can it be determined that the alleged preponderating and prevailing sentiment in favor of zoning or other restrictions on the use of private property is in fact a preponderating and prevailing sentiment. It is not justifiable to effect a

practical amendment of the Constitution of the United States by the enunciation of some vague and undefinable formula as descriptive of police power.

In the case of *Boyd v. U. S.*, 116 U. S. 616, 635; 29 L. Ed. 746, this court recognized that constitutional guarantees might be readily swept aside by stealthy encroachments thereon. Mr. Justice Bradley, speaking for the court, said:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal mode of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon. Their motto should be *obsta principiis*. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presentation, from noticing objections which become developed by time and the practical application of the objectionable law."

This court has never permitted the police power to be exercised in cases other than cases of legal necessity. It is a doctrine of protection having its origin in cases

where there was an immediate legal necessity for the protection of public health, morals or safety. Later the somewhat vague and almost illimitable term "public welfare" was incorporated in the definition of police power, and this term has formed the debatable ground upon which many battles have been waged in the courts as to its precise limitations. All courts have been loath to supplant their opinion as to the necessity of particular legislation for the opinion of the legislative body, but have at all times adhered to the rule that the question of whether or not the legislation in question conflicted with the constitutional inhibitions and restrictions upon the powers of state government was a question to be determined by the court alone.

Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205.

The courts will inquire into the question of whether or not the means used have a substantial relation to the end sought to be gained, and whether or not the alleged evil to be remedied may properly be remedied by the exercise of the police power and whether or not such alleged evil justifies the taking of property under the police power rather than the power of eminent domain.

Pennsylvania Coal Co. v. Mahon, supra.

We feel that if zoning is justifiable at all, it can only be realized through the exercise of the power of eminent domain. In other words, in the case at bar, if the city may, for the purpose of fostering, promoting and perpetuating the American home and the civic and social values thereof, place limitations upon the use of prop-

erty and absolutely prohibit uses which are in themselves inoffensive and absolutely necessary to the lives of the people, and this solely on the theory that such limitations upon use will benefit the community or a part thereof, then the taking of property is a taking for public use and is not a taking for the necessary protection of the people. The distinction between the powers is this: the police power is a power to be exercised to protect the public, while the power of eminent domain is a power given to the state whereby it may take property upon the payment of just compensation for the purpose of advancing or promoting some public enterprise for public benefit. In *Freund on Police Power*, section 20, the author distinguishes between eminent domain and police power as follows:

> "The police power is distinguished from the right of eminent domain in that the state by exercising the latter right takes private property for public use, thereby entitling the owner to compensation under the Constitution, while the police power, founded as it is on the maxim, *'Sic utere tuo ut alienum non laedas'*, is exerted to make that maxim effective by regulating the use and enjoyment of property by the owner, or, if he is deprived of his property altogether, *it is not taken for public use*, but rather destroyed in order *to conserve the safety, morals, health or general welfare* of the public, and in neither case is the owner entitled to compensation, for the law either regards his loss as *damnum absque injuria*, or considers him sufficiently compensated by sharing in the general (and, in this case, also the specific) benefits resulting from the exercise of the police power." (Italics ours.)

It will be noted from the above quotation that the author indicates the principal distinction to be that under the police power the use and enjoyment of property is not taken or restricted for public use or benefit, but to conserve the safety, morals, health and general welfare of the public. In the case of *Ambler Realty Company v. The Village of Euclid*, 297 Fed. 307, which case we understand is now pending before this honorable court, the rule is stated as follows:

> "In defendant's view, the only difference between the police power and eminent domain is that the taking under the former may be done without compensation and under the latter a taking must be paid for. It seems to be the further view that whether one power or the other is exercised depends wholly on what the legislative department may see fit to recite on that subject. Such, however, is not the law. If police power meant what is claimed, all private property is now held subject to temporary and passing phases of public opinion, dominant for a day, in legislative or municipal assemblies. * * *
>
> "Obviously, police power is not susceptible of exact definition. It would be difficult even if it were not unwise to attempt a more exact definition than has been given. And yet there is a wide difference between the power of eminent domain and the police power; *and it is not true that the public welfare is a justification for the taking of private property for the general good. The broad language found in the books must be considered always in view of the facts, and when this is done, the difficulty disappears.*" (Italics ours.)

The distinction is very succinctly stated in the case of *Pennsylvania Coal Co. v. Mahon, supra,* where the ques-

tion involved was whether the state could limit the right of property owners to take coal from under the streets and highways and private property in municipalities where such mining might cause unsafe conditions. In this case the purpose of the legislation was undoubtedly to protect the safety of the public, and where the necessity of the particular enactment, and the protection which would result, was much more apparent than in the case at bar. Mr. Justice Holmes, writing the opinion, said:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. (Cases cited.) *When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualifications more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.* * * * In general it is not plain that a man's misfortune or necessities will justify his shifting the damages to his neighbor's shoulders. (Cases cited.) *We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.*" (Italics ours.)

The Supreme Court of the State of Missouri in the case of *State ex rel. Penrose Investment Co. et al. v. McKelvey,* 256 S. W. 474, in holding a similar zoning ordinance unconstitutional, stated the distinction as follows:

"A further distinguishing feature is that the effect of the police power is to restrict a property right as harmful, while that of eminent domain is to appropriate a property right because it is useful." (Italics ours.)

Applying the foregoing rules to the facts in the case at bar, it must be clear that the taking of property under the ordinance here involved is a taking for public use and not a taking because the uses in themselves are harmful. By what stretch of imagination can it be urged that the construction of lodging houses, tenement houses, hotels and apartment houses on petitioners' property would be less inimical to public health, safety, morals or general welfare than a high-class, well-constructed jewelry store, or other stores, or fine buildings for the housing of offices of brokers, lawyers, bankers or other harmless and necessary business? How can it be said that the location in a particular district of the office of a lawyer, engineer or architect is more harmful than the location in the same district of the office of a dentist or a physician? Surely the fire hazard will not be increased by reason of the construction of a class A building in accordance with proper and reasonable building laws in this district. Nor can it be said that the ordinance here in question was designed to relieve traffic congestion on Wilshire boulevard, for it is a well known fact that tenements, apartment houses, hotels and railroad stations, all of which are permitted in Zone B, increase traffic to as great, if not to a greater, extent than the maintenance of stores or other uses permitted in class C.

H. Krumgold & Sons v. Jersey City (N. J.), 130A 635.

The city undoubtedly has power to pass ordinances for the purpose of preventing fires and decreasing fire hazards. But the city has no right to pass an ordinance saying that one can not use his property in a certain manner or construct upon it a certain building merely for the purpose of relieving itself of the duty of affording proper fire protection.

Eaton v. Village of So. Orange (N. J.), 130A. 362.

If the equipment of the fire department of the city is insufficient to meet the rapid growth of the city, then the city should increase its equipment, but it should not prevent and restrict growth so that it will not be necessary to make the additional expenditure. Also, if traffic conditions have become congested, it can adopt reasonable regulations to relieve that situation. If this is not sufficient, it has the power of eminent domain and it can construct new streets or widen the streets now in use, but the city can not indirectly exercise the power of eminent domain by prohibiting the owners of property from using their property for purposes which may cause the citizens of the city to come to that location for the transaction of particular business. Property owners should not, under the police power, be prevented from using their property for purposes for which it is clearly adapted, merely because the residents of Santa Monica and other communities, driving over Wilshire boulevard to and from the City of Los Angeles, might be interested in making better time on their journey.

Thus the power of the City of Los Angeles to impose the restrictions here involved upon petitioners' property

must rest for its validity upon the assumed fact that it will promote the social and civic values of the American home.

Just exactly how this will be accomplished by the provisions of the ordinance is not clear, and we may express some doubt as to the meaning of the phrase itself. The ordinance does not require the citizen to erect private homes nor live in them. It does not prevent him from building upon property zoned for business or even for industries of the lowest sort. He may build a family dwelling house adjacent to a gas works or a slaughter house and live in it if he chooses. He may live in tenements or lodging houses and rear his children there. In fact, if his financial status be such that he may not acquire a single family residence for the benefit of his family, he may be required to live in places of the other type admittedly not of as desirable character as a single family residence. Yet under this ordinance his place of residence thus imposed upon him as a penalty for his financial inability to acquire a better one must necessarily be removed from any district wherein more fortunate neighbors are permitted to exclusively live. He must of necessity live in a district devoted to undesirable residences and rear his children in a territory separated by law from other territory of superior environment. The children of the wealthy are thus enabled to reap the benefits of family influence developed in selected territory, while those of the poor are shunted to less desirable districts. So if the protection of the civic and social values of the home are a criterion the best that may be

said of this ordinance is that it protects such values only in favor of the wealthy.

Not only does this ordinance inure to the benefit of those well favored with financial advantages while discriminating against those less fortunate, but it also imposes involuntary servitudes upon the lands of one person desiring to use his property for business uses and purposes in favor of his neighbor and his neighbor's property without compensation. This involuntary servitude is imposed by law upon the property of one, not because that property is proposed to be used in a dangerous, injurious or offensive manner, but simply because of the desire of the owner of the property in whose favor it is created to use his property in an entirely different manner.

In the case of *Van Horne's Lessee v. Dorrance*, 2 Dallas 304, 1 L. Ed. 391, the Circuit Court of the United States, Pennsylvania District, had before it for consideration an act which purported to make certain grants void, and which purported to confirm the claims of certain Connecticut settlers. The court, after stating that the effect of the Act was to take the property of one citizen and vest it in another, said:

> "It cannot be assimilated to the case of personal property taken or used in time of war and famine, or other extreme necessity; it cannot be assimilated to the temporary possession of land itself, or a pressing public emergency, or the spur of the occasion. In the latter case there is no change of property, no divestment of right; the title remains, and the proprietor, though out of possession for a while

is still proprietor and lord of the soil. The possession grew out of the occasion and ceases with it. Then the right of necessity is satisfied and at an end; it does not affect the title, is temporary in its nature, and cannot exist forever. *The Constitution expressly declares, that the right of acquiring, possessing, and protecting property is natural, inherent, and unalienable. It is a right not ex gratia from the legislature, but ex debito from the Constitution.* It is sacred; for, it is further declared, that the legislature shall have no power to add to, alter, abolish, or infringe any part of the Constitution. The constitution is the origin and measure of legislative authority. It says to legislators, thus far ye shall go and no further. *Not a particle of it should be shaken; not a pebble of it should be removed. Innovation is dangerous. One incroachment leads to another; precedent gives birth to precedent; what has been done may be done again; thus radical principles are generally broken in upon, and the Constitution eventually destroyed. Where is the security, where the inviolability of property, if the legislature, by a private act, affecting particular persons only, can take land from one citizen who acquired it legally, and vest it in another?* The rights of private property are regulated, protected, and governed by general, known, and established laws; and decided upon, by general, known, and established tribunals; laws and tribunals not made and created on an instant exigency, on an urgent emergency, to serve a present turn, or the interest of a moment. Their operation and influence, are equal and universal; they press alike on all. Hence security and safety, tranquillity and peace. One man is not afraid of another, and no man afraid of the legisla-

ture. *It is infinitely wiser and safer to risk some possible mischiefs, than to vest in the legislature so unnecessary, dangerous and enormous a power as that which has been exercised on the present occasion; a power, that, according to the full extent of the argument, is boundless and omnipotent.* For, the legislature judged of the necessity of the case, and also of the nature and value of the equivalent." (Italics ours.)

As has been well observed by the Supreme Court of Kentucky in the case of *Pfingst v. Senn etc.*, 94 Ky. 563, 23 S. W. 358, 21 L. R. A. 569, one who lives in a city must necessarily submit to some annoyances which are incidental to city life. It requires merchants, trades people, etc., to constitute a city and all of these people have rights, and the only restriction placed upon such rights is that each shall so exercise and enjoy his rights as to do no injury in that enjoyment to others or to the rights of others. So long as this requirement is satisfied, then the individual's liberty and right to hold, acquire and use property should be protected rather than abrogated by law.

This court, in the case of *Pennsylvania Coal Co. v. Mahon, supra*, adhered to the doctrine that the individual owners of property, and even the state, should be permitted to enjoy only such rights as they had purchased, and that if the rights of the state or individual were not sufficient to meet their needs, they could then purchase such additional rights as were necessary, but they could not acquire them under the police power, and as to the state, it must acquire such additional rights under the power of eminent domain.

This court, in the case of *Meyer v. State of Nebraska*, 262 U. S. 390, 67 L. Ed. 1042, was called upon to decide whether or not a state could, by infringing upon the liberty of citizens, promote and foster a homogeneous people with American ideals. The court, speaking through Mr. Justice McReynolds, said:

> "It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals; and 'that the English language should be and become the mother tongue of all children reared in this state'. It is also affirmed that the foreign-born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type, and the public safety is imperiled.
>
> *"That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally, is clear; but the individual has certain fundamental rights which must be respected.* The protection of the Constitution extends to all,—to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, *but this cannot be coerced by methods which conflict with the constitution,—a desirable end cannot be promoted by prohibited means.* * * *
>
> "The desire of the Legislature to foster a homogeneous people with American ideals, prepared readily to understand current discussions of civic matters, is easy to appreciate. Unfortunate experiences

during the late war, and aversion toward every characteristic of truculent adversaries, were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state, and conflict with rights assured to plaintiff in error. The interference is plain enough, and no adequate reason therefor in time of peace and domestic tranquillity has been shown." (Italics ours.)

Again, in the case of *Buchanan v. Warley*, 245 U. S. 72, 62 L. Ed. 149, the court had before it the question of whether or not the state could for the asserted purpose of preventing race riots and promoting the public peace, prevent a white man from disposing of his property to a person of color. The court says, by Mr. Justice Day:

> *"It is urged that the proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution.*
>
> "It is said such acquisition by colored persons depreciates property owned in the neighborhood by white persons. *But property may be acquired by undesirable white neighbors, or put to disagreeable though lawful uses with like results.*" (Italics ours.)

It will be noted also in that case that this court expressly recognizes the fact that property could be put to uses which were disagreeable, without restriction on the part of the state.

We submit that these cases enunciate the true rule to be followed, and that when the state uses the police power in an attempt to further the general welfare, but does so by means which infringe upon the constitutional guarantees, then the constitution takes precedence and the ends to be obtained must fail by reason of the illegal means used to secure them.

If zoning can be justified upon the ground that it promotes the civic and social values of the home, then, to further promote the same end, the state would have power to insure family life by forbidding the use of any property for apartment houses, hotels or other buildings which are referred to in the opinion in *Miller v. Board of Public Works, supra,* as those which do not promote to the degree that single family dwellings do, the civic and social values of the American homes.

The civic and social values of the city would undoubtedly be promoted by the erection and construction of a beautiful civic center or by the erection of schools, parks, playgrounds and libraries, or the opening or widening of streets.

Is not a fire house, a police station, or a public school as obnoxious, as much of an affront to the esthetic sense as a millinery store or a dry goods store; and if this be true, does not "the protection of the American home" necessitate the removal of all schools, police stations and fire houses from the residential sections of the city? On the other hand, if these worthy institutions are necessary and are in furtherance of the public welfare, is it not proper under the decision of the Supreme Court of the State of California, to take from private ownership,

by virtue of the police power, and ignoring the eminent domain provisions of our laws, necessary lands and buildings in furtherance of such public welfare? While it is true that a beautiful expanse of lawn surrounding single dwellings would enhance the beauty of the landscape, would not the beauty be further enhanced by the acquisition and beautification of a park within such residential area, and while unquestionably the construction and maintenance of a park would be for the public welfare of the surrounding community, we believe we may safely assert that our Constitution would not permit the seizing of the property to construct the park under the police power rather than under a proceeding in eminent domain.

The establishment of districts for the construction of roads, sewers, storm drains, schools, fire protection and police protection are all in furtherance of the public welfare, yet in each case an assessment is levied in proportion to the benefit derived, and the property or use in the property taken for the furtherance of each of these public improvements is taken under eminent domain, the judgment being satisfied by the proceeds of the assessment levied on those benefited. It is unthinkable that the police power could be employed under such circumstances to deprive the individual of his property without just compensation. We most earnestly urge that any of the above purposes are more in furtherance of the public welfare and the "protection of the American home" than the prohibition of the lawful uses of property, seeking to accomplish the result, not by eminent domain as above pointed out, but under the police power.

There is no difference in theory or in fact in the opening or widening of a street over private property and

the restricting of property against uses for which it is adapted, which uses are inoffensive and even necessary. In both cases the owner's property right is not fully taken but is merely restricted, for the dedication or condemnation of a street results in the the acquisition by the public of an easement merely leaving in the owner the right to use the street for any purpose not inconsistent with its use by the public for street purposes. So, too, zoning leaves in the owner of the property the right to use the property for any purpose not inconsistent with the restrictions and limitations and inhibitions of the zoning ordinance. It is manifest, therefore, that the taking of property for a street purpose is not more or not less a taking than are the provisions of this zoning ordinance. There is certainly no difference in principle or in actual consequence. Yet no one would consent to the acquisition of the property necessary for street purposes under the police power, rather than the power of eminent domain.

This court has time and again enunciated the doctrine that a legal business, conducted in a lawful manner, cannot be arbitrarily restricted or regulated under the police power. As stated in the case of *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 388, by Mr. Justice Brown:

> "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of

protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts."

See also:

McLean v. Arkansas, 211 U. S. 539; 53 L. Ed. 315; 29 Sup. Ct. Rep. 206;

Murphy v. California, 225 U. S. 623; 56 L. Ed. 1229; 32 Sup. Ct. Rep. 697;

Adams v. Tanner, 244 U. S. 590; 61 L. Ed. 1336;

Wolf Packing Co. v. Court of Industrial Relations, 262 U. S. 522; 67 L. Ed. 1103;

Burns Baking Co., v. Bryan, 264 U. S. 504; 68 L. Ed. 813;

Weaver v. Palmer Bros. Co., 46 Sup. Ct. 320; 70 L. Ed.

This court, as well as the courts of other states in the Union have at all times held that businesses which are harmful or injurious to the public may be restricted as to the place wherein they may be carried on, and that municipalities or other governmental agencies may create districts wherein such harmful, injurious or offensive business may be conducted and declare that they can not be conducted in any other place. Cases of this character are *Hadacheck v. Sebastian*, 239 U. S. 394; *Barbier v. Connolly*, 113 U. S. 27; *Soon Hing v. Crowley*, 113 U. S. 703; *Reinman v. Little Rock*, 237 U. S. 171; but in each of those instances it was found that the maintenance of the particular business was one which was harmful

and injurious to the public by reason of obnoxious odors, noise or the dangers which attended the operation of the plant. But this court has never enunciated a doctrine that property could be segregated as to use and certain uses absolutely prohibited in certain localities, irrespective of the question of whether or not such use in a particular locality was harmful or injurious to the public, and in each of the cases heretofore cited where the question of segregation of uses has been before this court, the police power, in respect to the particular facts involved, has only been applied as a protective measure and the prohibition sustained because the use to which the property was to be put was in itself harmful and injurious to the public health, safety or morals, or one likely to become a nuisance.

In the case of *Yates v. Milwaukee*, 77 U. S. 497; 19 L. Ed. 84, this court had before it the question of whether the state could, by declaring a certain wharf a nuisance, and by the creation of an artificial and imaginary dock line, deprive a riparian owner of his use of such wharf and his access to the river, and give to the city a right to abate the wharf as a nuisance.

> "But the mere declaration by the City Council of Milwaukee, that a certain structure was an encroachment or obstruction, did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. *It is a doctrine not to be tolerated in this country, that a municipal corporation, without any general laws either of the City or of the State, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any per-*

> *son supposed to be aggrieved, or even by the City itself. This would place every house, every business, and all the property of the City, at the uncontrolled will of the temporary local authorities.* Yet this seems to have been the view taken by counsel who defended this case in the Circuit Court; for that single ordinance of the City, declaring the wharf of Yates a nuisance, and ordering its abatement, is the only evidence in the record that it is a nuisance or an obstruction to navigation, or in any manner injurious to the public." (Italics ours.)

These rules were followed by the courts of the State of California until the decision in the case at bar and the decision in the companion case, *Miller v. Board of Public Works, supra,* were rendered. In the case of *Ex Parte Whitwell,* 98 Cal. 73, the Supreme Court of the State of California had before it the question of whether an ordinance requiring hospitals for the care of insane persons to be constructed of a particular kind of material and surrounded by a wall at least 12 feet high and 18 inches thick, and providing that no such building should be permitted within 400 feet of any building or school, was a valid exercise of the police power. In holding the ordinance unconstitutional, the court said:

> "The provision that no asylum, in which persons suffering from any degree of insanity are treated, shall be permitted within four hundred yards of any dwelling or school, cannot in our judgment be sustained as a lawful police regulation. *A law or ordinance, the effect of which is to deny to the owner of property the right to conduct thereon a lawful business, is invalid unless the business to which it relates is of such a noxious or offensive*

character that the health, safety, or comfort of the surrounding community requires its exclusion from that particular locality, and an asylum for the treatment of mild forms of insanity is not properly classed as such. If rightly conducted such asylum would not render the occupation of dwellings or schools in its neighborhood uncomfortable to such a degree that its maintenance would be deemed a nuisance, or any impairment of the substantial rights of occupants of such dwellings or schools. It is not like a private asylum for the confinement of dangerous lunatics, or a hospital for the treatment of loathsome or contagious diseases; and the reasons which make it necessary and proper to exclude from the thickly settled portions of cities and towns slaughter-houses, soap factories, and tanneries, with their offensive smells; magazines for the storage of powder, and powder mills, with their attendant dangers, or any business or occupation which seriously interferes with the health or comfort of others if permitted in such localities, do not apply to a hospital, whose inmates are harmless, although insane. It is possible that the maintenance of such an asylum would be to some people in its vicinity disagreeable and annoying, in the sense that it would be more or less repulsive to them; but this is not enough to justify a regulation like that under consideration. *There are many unpleasant and annoying things which must be borne by persons living in a state of organized society, in order that others may also enjoy their equal rights under the law.*" (Italics ours.)

See also:

In re Wisner, 32 Cal. App. 637;
San Diego Tuberculosis Association v. City of East San Diego, 186 Cal. 254;
Frost v. City of Los Angeles, 181 Cal. 28;
In re Kelso, 147 Cal. 609.

Tested by all these principles, it must be apparent that an ordinance which provides that in a certain locality only single family residences may be constructed (Zone A), and in other localities only single family or multiple dwellings may be erected, but that no business at all may be conducted, and no improvement or structure erected wherein any kind of business may be established or profession carried on save only that of physician or dentist, and that in certain other localities business of a certain character may be carried on, but where, also, may be erected dwellings of every character, is unconstitutional.

It must be clear that the question of public health, safety and morals or the general welfare play no part in the segregation of the uses of property. The fact that the Planning Commission gave many months of careful consideration to the creation of the particular zones or districts is immaterial, if, as a matter of fact, the ordinance is, in its scope and nature, and the results flowing therefrom, an unconstitutional law. The members of the Planning Commission may have assumed a right to enact the zoning ordinances unhampered by constitutional limitations, and if their views of their powers were at variance with the rightful conception

of such powers, the result of their act must be deemed invalid.

The decisions relative to zoning in the various state courts where the question has been presented can not be reconciled. Those courts which have adhered to the constitutional limitations on the police power and which have refused to depart from the long-accepted conception of police power as a doctrine of protection, have uniformly held, in well considered cases, that comprehensive zoning laws are unconstitutional and in direct violation of the provisions of the 14th Amendment of the Constitution of the United States. The courts of other states have seen fit to enlarge the powers of the state to heretofore unknown bounds, and in the magic term "police power" find an excuse for wiping out constitutional limitations and restrictions and furthering the insidious doctrine of communal control. In order that the court may have the views of the various state courts before it, we will cite and quote from the various decisions, both those which hold zoning unconstitutional as well as those holding zoning constitutional.

We will first discuss those cases which determine that the state has this power. One of the earliest cases was the case of *Ware v. City of Wichita* (Kansas) 214 Pac. 102. In that case we find this remarkable statement:

> "There is an aesthetic and cultural side of municipal development which may be fostered within reasonable limitations. (Cases cited.) Such legislation is merely a liberalized application of the general welfare purposes of the State and Federal Constitution."

In other words, the court seems to feel that the police power may be used for aesthetic purposes alone. This doctrine has been renounced by practically all of the courts of the Union. See in particular the leading cases of *City of Passaic v. Patterson etc. Company*, 72 N. J. L. 285; 111 Am. St. Rep. 676; 62 Atl. 267; *Ayer v. Cram (Mass.)* 106 N. E. 340; *Varney & Green v. Williams*, 155 Cal. 318. See also McQuillen on Municipal Corporations, 1921 Supp., pages 7124 to 7127.

In Massachusetts the leading case on the question of zoning is *In re Opinion of Justices* (Mass.) 127 N. E. 525, which, while not involving any contest between parties, has been stated in subsequent decisions to enunciate the rule in Massachusetts. The court, in sustaining the power of the state or municipalities to zone, stated that:

> "The segregation of manufacture, commercial or mercantile business of various kinds to particular localities, when exercised with reason, may be thought to bear a rational relation to the health and safety of the community."

It also states that health and security from injury to children and the old and feeble, as well may be promoted by such segregation, and that the prevention of disorder may be facilitated. With due respect to the opinion we feel that the reasons given and the assumption that certain results might flow or be thought to flow from legislation of this character, constitute a very thin thread upon which to suspend the constitutional liberties and rights of the individual. Admittedly proper police regulations could be made to subserve the ends which were

thought by the Massachusetts court to be gained by zoning. The thought in the case seems to be that the property rights of the individual may be taken in order to aid the city in the performance of certain governmental functions such as the suppression and prevention of disorder, fire protection and the regulation of traffic in a given district, while in other districts the same governmental functions should be rendered without imposing restrictions though attended with greater difficulty because of the character of use to which the property in such districts might be put. In other words, the thought is that, although each citizen pays his proportionate share of taxation for the suppression of disorder, fire protection and the regulation of traffic, still the city may relieve itself of giving such protection to his property if situated in a certain district by saying that in that district things may not be done which would give rise to a necessity for such protection; while other owners in other more favored districts, and paying no more as their proportionate share for such protection, may have the same and also use their property for purposes which makes the performance of those functions of government more difficult, and this to the uncompensated loss of their neighbors. This court also feels one may be deprived of his property so that "regular and efficient transportation of bread winners to and from places of business may be expedited." Although the property owner pays for the construction and repair of streets, still in order that "construction and repair of streets may be rendered easier and less expensive if heavy traffic is confined to specified streets by the business

there carried on" he may be deprived of his property in order that that end might be accomplished. Yet, in more favored localities where property is not so restricted, the city is willing without depriving the property owner of the uses of his property, to construct and repair streets under less favorable conditions and at a greater expense. Subsequently, in the case of *Brett v. Building Commissioner of Brookline*, 250 Mass. 73, 145 N. E. 269, the Supreme Court of Massachusetts gave as an additional excuse its belief that it might be thought that the public welfare would be promoted by each family dwelling in a house by itself, and that there would be an increase in fresh air, freedom of play for children, and that if each family did so live in a separate dwelling, there might be a reduction in the spread of diseases. *But these zoning laws do not require people to live in separate dwellings*, nor do they take into consideration their financial ability to do so. There seems simply to be a nebulous possibility that if cities are zoned, people may live in separate dwellings. We even have the court of North Dakota going so far as saying, in the case of *City of Bismarck v. Hughes*, 208 N. W. 711 (Advance Sheets), that zoning ordinances are justified because of the fact that there is a tendency on the part of the American people to live in apartments rather than in separate dwellings, and that any law which might tend to decrease the construction of apartments would be justified. We can well agree that children need places to play in, and an abundance of fresh air. These places may be provided for by the State under the right of eminent

domain, or if the necessity is such that an absolute prohibition of the erection of apartment houses or multiple dwellings of any kind would be justified, then a law forbidding the construction of all such buildings might be valid. But a law which simply says to certain favored people or citizens that they can use their property for the construction of such buildings, but that certain less favored citizens and owners of property can not so use their property, would certainly be, and is, an unfair, arbitrary and discriminatory means for attaining an end which is not in any way required by the ordinance itself, and which can not possibly be attained under it. The crowding together of all apartment houses, tenements or multiple dwelling houses in a certain district would aggravate the situation, rather than remedy it, and would render impossible the ends which the Massachusetts court seems to believe so desirous.

The leading case in the State of Louisiana is the case of *State ex rel. Civello v. City of New Orleans*, 97 So. 440. That case overrules the former decisions of that court on the subject of zoning; *Calvo v. City of New Orleans*, 136 La. 480, 67 So. 338; *State ex rel. Blaise v. City of New Orleans*, 142 La. 73, 76 So. 244, which cases held that the purpose of zoning was to promote only aesthetic considerations and were unconstitutional as unsustained by considerations of the public health, safety, comfort or public welfare. We find this amazing doctrine enunciated:

> "It is not necessary, for the validity of the ordinances in question, that we should deem the ordinances justified by considerations of public health,

> safety, comfort or the general welfare. It is sufficient that the municipal council could have reasonably had such considerations in mind. If such considerations could have justified the ordinances we must assume that they did justify them."

Whether the ends actually justified the means or not is immaterial to this court. If the municipal corporation merely had considerations of public health, safety, comfort or general welfare *in mind, or could have had such considerations in mind*, the ordinance is valid whether or not there was any necessity therefor, or whether or not such considerations justified the ordinance. The court further states that police protection would be cheaper because of the fact that patrolman beats in residential districts are longer than in business districts, and that if uses are restricted, the policing of the city will be simpler. The court further states:

> "A place of business in a residence neighborhood furnishes an excuse for any criminal to go into the neighborhood where otherwise a stranger would be under the ban of suspicion. Besides, open shops invite loiterers and idlers to congregate; and the places of such congregations need police protection."

We may say that hotels, tenements and apartment houses might also furnish an excuse for criminals to go into the neighborhood, and a place where strangers would not be under the ban of suspicion. Moreover, it is very doubtful if citizens living in single family dwellings gaze upon each newcomer in the district with a gaze of suspicion, and watch with fear or suspicion the occupants of each and every automobile passing upon the

street. Why, in the City of Los Angeles a large number of next-door neighbors do not even know each other. The population shifts from time to time, the newcomer and the stranger are the rule rather than the exception. We may also say that loiterers and idlers congregate as much in dwellings, especially tenements, as in any other place. Counsel for the City of Los Angeles, in a case which was subsequently dismissed because it became moot, made the assertion that tenement houses which are permitted in Zone B, where petitioners seek to erect a high class store building, are the rendezvous of criminals.

The Louisiana Supreme Court also feels that street paving will be cheaper if zoning is permitted; and that a better and more extensive "fire department—better equipment and *younger and stronger men* are needed in the business centers, where buildings are taller than in residential districts." We feel that we have sufficiently commented on this line of reasoning. Why not by ordinances prohibit any buildings whatever and thus keep down both the population and the expense of taking care of it?

The court continues:

> "Aside from considerations of economic administration, in the matter of police and fire protection, street paving, etc., any business establishment is likely to become a genuine nuisance in a neighborhood of residences. Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous, some are unsightly, some are apt to breed rats, mice, roaches, flies, ants, etc. Property brings a better price in a residence neigh-

> borhood where business establishments are excluded than in a residence neighborhood where an objectionable business is apt to be established at any time."

If places of business are noisy, we may say that apartment houses or tenements, or event private dwellings are also noisy if improperly conducted. Some business houses are unsightly. The same may be said of some single family dwellings and multiple family dwellings. If some stores are apt to breed rats, or other vermin, the same is true of dwellings. All of these evils may be remedied as to both dwellings and stores by proper police regulations, but a zoning ordinance does not remedy the evil. It permits in dwelling house districts the erection of unsightly buildings, the conduct of such buildings in a manner such as to make them malodorous or vermin-infested or noisy. It permits the same situation to exist in districts where business may be carried on. The fact that property in a restricted district may bring a better price as residence property (but not for all purposes) than if it was unrestricted is, as we have heretofore noted, no reason whatever for the state to place an involuntary and uncompensated servitude upon the property of one man so that the property of his neighbor may have a greater value for certain uses. How poorly the Supreme Court of Louisiana analyzes the law and principles involved in the question before it is shown by the fact that it cites the case of *Hadacheck v. Los Angeles, supra; Cusack v. Chicago,* 242 U. S. 529, 61 L. Ed. 472; *St. Louis Poster Co. v. St. Louis,* 249 U. S. 269, 63 L. Ed. 599, as authority for the right of a municipality to

prohibit ordinary inoffensive business in a residential area, and to enact the so-called zoning ordinances. All these cases were cases involving businesses which were in themselves nuisances, or likely, because of the method of operation, to become nuisances. The Hadacheck case was a case involving a brick factory where the proofs showed that the operation of the plant was obnoxious and disturbing to residents of the community. The other two cases involved billboards where it was shown that bill boards caused the collection of rubbish, and afforded hiding places for criminals, and had other attributes which were clearly within the power of the state under the police power to regulate or forbid. The court also states that aesthetic considerations alone, tending to beautify the neighborhood, are sufficient to justify the exercise of the police power even though such exercise will deprive the citizen of valuable property rights.

The court also states that Missouri has permitted zoning laws. *This is true, but not under the police power.* The court of Missouri has, in the case of *State Ex Rel Penrose Inv. Co. v. McKelvey*, 256 S. W. 474, hereinafter discussed at length, held that zoning ordinances of the character herein in question, unconstitutionally deprive citizens of their property without due process of law. But the same court has, by a divided court, decided that zones may be created under the power of Eminent Domain where the citizens are compensated for the servitude placed upon their land and the uses of which they are deprived. See *Kansas City v. Liebe*, also known as *In re Kansas City Ordinance* No. 39946, 252 S. W. 404. (The case cited by the Louisiana court.) It will

be noted that the court was divided in this case as to the *validity of zoning property even under Eminent Domain proceedings.*

In Wisconsin the court sustained a zoning ordinance in the case of *State Ex Rel Carter v. Harper*, 196 N. W. 451. The court seems to feel that aesthetic considerations alone are sufficient to justify the imposition of restrictions upon the use of property of the citizen and the deprivation of such use under the police power. The Wisconsin court also states that "he who owns property in such a district is not deprived of its use by such regulations" and the reason given for this remarkable statement is that the citizen can still use it for the uses permitted under the ordinance. We feel that it would be a waste of time to cite endless authority holding that the "property" protected by the Constitution is not merely a legal title to property, but embraces the free and unobstructed use of the property in a lawful manner for a lawful purpose. That the value of property is dependent upon its use and that an ordinance or statute which forbids the use of property or deprives the owner of the beneficial use thereof is a statute or ordinance which takes property within the meaning of the constitutional provisions is manifest.

The Supreme Court of Oregon falls into the same error of believing that there is no taking of the property of a citizen under a zoning ordinance because he has exactly the same estate as he had before. This is the case of *Kroner v. City of Portland*, 240 Pac. 536. It is noteworthy that in that case the court, while sustaining a

comprehensive zoning ordinance, had, as to the particular facts, the question of whether or not the City of Portland was justified in refusing to permit the erection of a creamery in a residential district. The court says:

> "It is plain that governmental agencies invested with the police power, as the City of Portland is, can enact laws regulating the use of property for business purposes. Otherwise it would be permissible to erect a powder mill on the site of the Hotel Portland, or to install a glue factory next to the city hall, or to erect a boiler shop adjacent to the First Congregational Church. Such things would be legitimate but for the restraint of the police power. The difference between such instances and the present contention is in degree and not in principle.
>
> "Applied to the present situation it is very clear that a creamery, with its boilers, milk cans, delivery trucks, processes of manufacturing, and fire risks of the business, require treatment in the way of regulation different from that appropriate to a mere private dwelling. * * *."

We can agree with the court that the location of a creamery and its pasturizing plant might, because of its character and the manner in which it is conducted, become a nuisance, and that a large amount of noise and confusion would result from the conduct of the plant, and that insofar as creameries or other light manufacturing establishments are concerned, their segregation in a certain part of the city is proper where their conduct would be attended with evils preventable under the police power. The dissenting opinions in that case seem to take the view that that case upholds the constitutionality

of zoning in general. We do not feel that it necessarily does so, and if it does it is merely *dicta*.

In the case of *City of Aurora v. Burns* et al., 319 Ill. 84, 149 N. E. 784, the Supreme Court of Illinois sustained an ordinance which prohibited the erection of a store in a residential district. In holding the ordinance constitutional, the court said:

> "The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residence streets, expedite local transportation, and facilitate the suppression of disorder, the extinguishment of fires, and the enforcement of traffic and sanitary regulations."

Two of the judges dissented. It will be noted that practically all of these so-called zoning ordinances permit the continuance of all present business establishments in residential areas, which establishments the courts so hopefully state are detrimental to the public welfare for some nebulous reason or other. We feel that we have sufficiently commented upon the reasons given by the Illinois court heretofore.

In Minnesota, the Supreme Court of that state first held that zoning was unconstitutional in that it deprived the citizen of his property without due process of law. *State Ex Rel Lachtman v. Houghton*, 158 N. W. 1017; *State Ex Rel Roerig v. Minnesota*, 162 N. W. 477. Later, the court had before it the question of whether or not a city could be divided into zones under the power of Eminent Domain. The court held first that the exercise of the power of Eminent Domain for such purposes was

not taking property for public use and consequently the statute authorizing such proceedings was unconstitutional, but on rehearing, by a divided court, it upheld the constitutionality of the statute. *State v. Houghton*, 144 Minn. 1; 174 N. W. 885; 176 N. W. 159, 8 A. L. R. 585. Subsequent to that decision the court reversed its position upon zoning and held that, under the police power, it was constitutional, and that compensation need not be made for the uses of which the owners of property were deprived. *State v. Houghton*, 204 N. W. 569. Among the reasons assigned for the reversal of the former decisions was the purported fact that the condemnation of property under the power of Eminent Domain was difficult as a practical matter, and that the values which would have to be established might be more or less theoretical, and the court stated that as many municipalities had adopted zoning ordinances, and as the police power was rapidly expanding it might be deemed to embrace regulations of this character because of the changing social and economic conditions of the people. The court also, as is usual in decisions of this character, cites numerous nuisance cases which are clearly inapplicable as supporting its decision.

From a reading of these Minnesota cases, as well as from a reading of the Louisiana cases, it is apparent that the courts of these states, when first faced with the question, clearly saw the constitutional infringement, and then later reversed their former decisions, not because the ordinances had changed over night as to their characteristics, or because of any change of condition really necessitating the same, but merely because there was

a feeling that the people might want ordinances of this character.

In the case of *Wulfsohn v. Burden*, 241 N. Y. 288, 150 N. E. 120, the Court of Appeals of New York sustained zoning, that is, the general proposition that cities may establish residential districts and exclude business therefrom and as authority therefor cite the case of *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N. Y. 313, 128 N. E. 209, which latter case involved the question of whether or not a zoning restriction was an encumbrance such as would violate a contract to convey free from encumbrances.

The Supreme Court of the state of Arkansas has been said to have sustained the constitutionality of zoning regulations in general. The cases decided by that court are *Herring v. Stannus*, 275 S. W. 321 and *City of Little Rock v. Pfeifer*, 277 S. W. 883. The first case involved the constitutionality of an ordinance which prohibited gasoline stations in residential districts, and basing its decision upon the case of *City of Des Moines v. Manhattan Oil Co.*, 193 Iowa 1096, 184 N. W. 823, 23 A. L. R. 1322, which case decided that the use of property for maintaining a gasoline station was a use which was in its characteristics a nuisance, or might likely become such, the court held that the ordinance was valid.

In the second case the question involved was whether or not the city council had properly revoked a permit for the construction of a store building in a certain district under an ordinance which prohibited the erection of such structures in a residential area. The court found that

the district in which the store building was to be erected was one devoted to business, and that the owner was entitled to a permit. The court in the course of its decision stated that the former decision of the court in *Herring v. Stannus, supra,* should be deemed as sustaining in general, ordinances of this character, but it is noteworthy that neither decision actually involved a case where, in the final determination, a non-nuisance use of property was prohibited.

We will now consider the cases which hold zoning ordinances of the character here involved unconstitutional.

Before discussing the cases where the question has been directly presented, we wish to call the court's attention to cases where the courts of different states have been called upon to express an opinion as to the constitutionality of a particular ordinance, or to decide whether or not an ordinance of this character was one properly enacted under the general welfare clause of the police power.

In the case of *In re Opinion of the Justices,* 128 Atl. 181, the Supreme Judicial Court of the State of Maine was called upon to give its opinion as to the constitutionality of a proposed statute of the Legislature, under which municipalities were given power to enact zoning ordinances, prescribe districts and regulate the use of property in such districts. The court refused to say that the prohibition of all business uses of property in certain prescribed areas was valid, but stated that the location of certain classes of business was proper under the police power, citing *Hadacheck v. Sebastian, supra,* and *Reinman v. Little Rock,* 237 U. S. 171, 59 L. Ed. 900,

which cases, of course, involved the location of business enterprises which were, or might readily become, nuisances.

In the case of *Clements v. McCabe*, 210 Mich. 204, 177 N. W. 722, the Supreme Court of the state of Michigan had before it the question of whether or not the city of of Detroit had power to pass an ordinance of the character here involved. The statute gave to municipalities the power to provide for the public peace and health, and for the safety of persons and property, and for the regulation of trade, occupations and amusements. The court held that this did not authorize the municipalities to enact the general zoning ordinance in question. The court said:

> "* * * the regulation of trade, occupations or amusements cannot fairly be said to specifically authorize their entire prohibition on otherwise unrestricted private property, as the proposed zoning system contemplates. To regulate a business, trade, occupation or amusement under the police power contemplates that it may be engaged in subject to prescribed rules or methods deemed essential for public peace, health and safety. While to prohibit indicates to prevent or do away with the same entirely."

The court concluded that neither the Constitution nor the statutes gave to the city the "evolutionary and comprehensive police power of zoning" claimed.

A somewhat similar question was presented to the Supreme Court of Florida in the case of *State v. Fowler*, 105 So. 733. The statutes of Florida granted to munici-

palities the power to enact legislation for the protection of the public health, safety, morals and general welfare. The court held that the general conception of the rights of a municipality under the general welfare phase of the police power was not sufficient to include so far-reaching and comprehensive a power as that asserted by zoning authorities and that necessary to uphold the validity of zoning ordinances, and therefore held that the zoning ordinance involved was void. The court further held that a retail grocery store could not be deemed a nuisance. See, also, *Anderson v. Shackleford*, 74 Fla. 36, 76 So. 343.

In the case of *City of Covington v. Summe & Ratermann Co.*, 276 S. W. 534, the Court of Appeals of Kentucky had before it the question of whether or not the zoning of one block against manufacturing enterprises was valid. The ordinance was held discriminatory and void and in the course of its opinion the court pointed out that municipalities only had the power to regulate or prohibit those things which were nuisances and declared to be such.

In the case of *Boyd v. Board of Councilmen*, 117 Ky. 199, 77 S. W. 669, the court had before it the question of whether or not a municipality could refuse to grant a permit for the erection of a negro church in a residential district merely because the manner of worship was boisterous and noisy. It was claimed that the city had such power under the police power, and that the refusal of the council to grant the permit would tend to decrease riots and would promote the peace and quiet of the

neighborhood. The court held that the action of the council was invalid and that if the church became a nuisance it could be abated, but that the erection of a place of worship could not properly be prohibited under any theory of the police power. It is, therefore, apparent that the Kentucky courts have taken the view that in order to prohibit the construction of certain classes of buildings or enterprises in certain localities, the enterprise or use to which the building is to be put must be in the nature of a nuisance which may properly be declared to be a nuisance by the municipal authorities under the police power, and that if the use of the property is inoffensive, it cannot be prohibited. See, also, *Pfingst v. Senn*, 94 Ky. 563, 23 S. W. 358.

The Supreme Court of Appeals of West Virginia has never been called upon to directly pass upon the validity of ordinances of the character here involved, but has had before it certain cases in which the court has enunciated principles which would tend to show that if presented with the question they would refuse to sustain the validity of such ordinances.

In *State Ex Rel Sale v. Stalman*, 81 W. Va. 335, 94 S. E. 497, the court had before it the question of whether a municipality could restrain and prohibit a property owner from erecting a one-story building between three and four-story buildings. The building involved was to be devoted to commercial uses. After stating that the exercise of the police power must have some substantial basis and could not be made a mere pretext for legislation which does not properly fall within the scope of that power, the court said:

"The power and authority over relator's property claimed by the city, if allowed by law, would be a serious restraint upon his right of use and enjoyment. It cannot be imposed for the benefit of adjacent or neighboring property owners. *Eubank v. Richmond, cited.* Nor can it be imposed to affect the symmetry of the city, street or section, otherwise than under the power of Eminent Domain, allowing compensation, if at all. *Fruth v. Board of Affairs,* cited."

The same court had before it in the case of *State Ex Rel Austin v. Thomas,* 96 W. Va. 628; 123 S. E. 590, a zoning ordinance which prohibited the erection of business buildings in residential districts without the consent of neighboring property owners. This ordinance was held unconstitutional as an unwarranted delegation of the police power to citizens.

The same court also indicated its attitude upon the question in the case of *State v. Mayor and City Council,* 117 S. E. 888. The City Council had adopted a policy of refusing permits for the construction of public garages in residential areas, and the relator desired to construct a garage for the storing of cars upon his property. The court held that the construction of the garage could not be prohibited merely because of aesthetic considerations, or its effect upon the symmetry of the city, street or section.

In the case of *Turner v. City of New Bern,* 187 N. C. 540; 122 S. E. 469, the court had before it an ordinance prohibiting lumber yards and wharves on property in a certain district fronting a river. After stating the gen-

eral rule that aesthetic considerations could not form the basis of the exercise of the police power, the court said:

> "In short, the scope of the city government is not restricted to its primitive uses of the protection of life and limb and for the accommodation of business, but can embrace the preservation of the attractions as a place of residence, *though a regulation for the latter purpose alone cannot be sustained except upon compensation under the right of eminent domain.*" (Italics ours.)

We will now pass on to a discussion of the cases where zoning ordinances of the character here involved have been directly presented to the courts of various states for decision and the decision of the court has been against their constitutionality. One of the earliest cases was the case of *Spann v. City of Dallas*, 235 S. W. 513, in which the Supreme Court of the state of Texas had before it an ordinance prohibiting the construction of improvements for business purposes upon property if there were, within the radius of 300 feet of said property, established residences, without the consent of the adjacent property owners. The court said:

> "The ordinance takes no heed of the character of business to be conducted in the store house which it condemns. It disregards utterly the fact that the business may be legitimate, altogether lawful, in no way harmful and even serve the convenience of the neighborhood. Its prohibition is absolute. No business house of any kind, for the sale of goods of any character, or for the conduct of any business whatsoever, in its command, shall be permitted within 'a residence district' without the consent of three-

fourths of the property owners of the district, and, in addition, the building inspector's approval of the design of the structure. Even if the necessary consent of the property owners is obtained, and though the building is to be one safe and substantial, yet, according to the ordinance, if its architectural design does not accord with the taste of the building inspector, its construction is no less positively interdicted. No rule, no standard, no regulation of any kind is given whereby the applicant may know to what particular design of building he must conform. If the design, whatever its merits, does not suit the inspector, it is within his uncontrolled power to prohibit the building.

"The justification of this far-reaching municipal law, as urged on behalf of the city, is that it is but a rightful exercise of its police power, as conferred by a general charter provision granting it the authority to protect by ordinance 'health, life and property,' abate nuisances, preserve and enforce 'the good government, order and security' of the city, and to protect 'the lives, health and property' of its inhabitants.

"Passing by the question as to whether the specific power to regulate the location of store houses—limiting rights of property secured to every citizen under the general laws of the state, may be deduced from any such general charter provision, or may not be exercised by a city at all in the absence of express statutory or charter grant (*Pye v. Peterson*, 45 Tex. 312, 23 Am. Rep. 608; *People v. City of Chicago*, 261 Ill. 16, 103 N. E. 609, 49 L. R. A. (N. S.) 438, Ann. Cas. 1915A, 292; *Clements v. McCabe*, 210 Mich. 207, 177 N. W. 722), we will deal at once with what we consider the larger ques-

tion in the case, namely: Whether under the authority of the police power the citizen may be denied the right to erect, and in effect the right to own, a store house in a residence portion of a city, for the conduct of a lawful, inoffensive and harmless business.

"Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right. Therefore a law which forbids the use of a certain kind of property, strips it of an essential attribute and in actual result proscribes its ownership.

"The police power is a grant of authority from the people to their governmental agents for the protection of the health, the safety, the comfort and the welfare of the public. In its nature it is broad and comprehensive. It is a necessary and salutary power, since without it society would be at the mercy of individual interest and there would exist neither public order nor security. While this is true, it is only a *power*. It is not a *right*. The powers of government, under our system, are nowhere absolute. They are but grants of authority from the people, and are limited to their true purposes. The fundamental rights of the people are inherent and have not been yielded to governmental control. They are not the subjects of governmental authority. Constitutional powers can never transcend constitutional rights. The police power is subject to the limitations imposed by the Constitution upon every power

of government; and it will not be suffered to invade or impair the fundamental liberties of the citizen, those natural rights which are the chief concern of the Constitution and for whose protection it was ordained by the people. All grants of power are to be interpreted in the light of the maxims of Magna Charta and the Common Law as transmuted into the Bill of Rights; and those things which those maxims forbid cannot be regarded as within any grant of authority made by the people to their agents. Cooley, Const. Lim. 209. In our Constitution the liberties protected by the Bill of Rights are, by express provision, 'excepted out of the general powers of government.' It is declared that they 'shall forever remain inviolate,' and that 'all laws contrary thereto shall be void.'

"To secure their property was one of the great ends for which men entered into society. The right to acquire and own property, and to deal with it and use it as the owner chooses, so long as the use harms nobody, is a natural right. It does not owe its origin to constitutions. It existed before them. It is a part of the citizen's natural liberty—an expression of his freedom, guaranteed as inviolate by every American Bill of Rights.

"It is not a right, therefore, over which the police power is paramount. Like every other fundamental liberty, it is a right to which the police power is subordinate.

"It is a right which takes into account the equal rights of others, for it is qualified by the obligation that the use of the property shall not be to the prejudice of others. But if subject alone to that qualification the citizen is not free to use his lands

and his goods as he chooses, it is difficult to perceive wherein his right of property has any existence.

"The ancient and established maxims of Anglo-Saxon law which protect these fundamental rights in the use, enjoyment and disposal of private property, are but the outgrowth of the long and arduous experience of mankind. They embody a painful, tragic history—the record of the struggle against tyranny, the overseership of prefects and the overlordship of kings and nobles, when nothing so well bespoke the serfdom of the subject as his incapability to own property. They proclaim the freedom of men from those odious despotisms, their liberty to earn and possess their own, to deal with it, to use it and dispose of it, not at the behest of a master, but in the manner that befits free men.

"Laws are seldom wiser than the experience of mankind. These great maxims, which are but the reflection of that experience, may be better trusted to safeguard the interests of mankind than experimental doctrines whose inevitable end will be the subversion of all private rights.

"The police power is founded in public necessity, and only public necessity can justify its exercise. The result of its operation is naturally, in most instances, the abridgment of private rights. Private rights are never to be sacrificed to a greater extent than necessary. Therefore, the return for their sacrifice through the exercise of the police power should be the attainment of some public object of sufficient necessity and importance to justly warrant the exertion of the power.

"The public health, the public safety, and the public comfort are properly objects of this high im-

portance; and private rights, under reasonable laws, must yield to their security.

"Since the right of the citizen to use his property as he chooses so long as he harms nobody, is an inherent and constitutional right, the police power cannot be invoked for the abridgment of a particular use of private property, unless such use reasonably endangers or threatens the public health, the public safety, the public comfort or welfare. A law which assumes to be a police regulation but deprives the citizen of the use of his property under the pretense of preserving the public health, safety, comfort or welfare, when it is manifest that such is not the real object and purpose of the regulation, will be set aside as a clear and direct invasion of the right of property without any compensating advantages. Cooley Const. Lim. 248.

"These established rules provide the test for the validity of this ordinance.

"The ordinance is clearly not a regulation for the protection of the public health or the public safety. It is idle to talk about the lawful business of an ordinary retail store threatening the public health or endangering the public safety. It is equally idle in our opinion to speak of its impairing the public comfort or as being injurious to the public welfare of a community. Retail stores are places of trade, it is true, but as ordinarily conducted they are not places of noise or confusion. This is particularly true of small stores, such as it appears the plaintiff contemplated erecting. The ordinary trading that goes on within them is reputable and honorable, and can hurt nobody. According to common experience it is done in an orderly manner. It could disturb or

impair the comfort of only highly sensitive persons. But laws are not made to suit the acute sensibilities of such persons. It is with common humanity—the average of the people, that police laws must deal. A lawful and ordinary use of property is not to be prohibited because repugnant to the sentiments of a particular class. The ordinance visits upon ordinary retail stores, engaged in a useful business, conducted in an ordinary manner, frequented and availed of by respectable people, and doubtless serving as a convenience to many, all the proscription visited upon common nuisances. In the face of common knowledge that they are ordinarily respectable and peaceable places for the conduct of perfectly lawful pursuits evolved out of recognized customs and habits of the people as old as American life, the ordinance deals with them as though they had all the offensive character of a nuisance. But their treatment, in effect, by the ordinance as a nuisance does not make them so. It is a doctrine not to be tolerated in this country that either state or municipal authorities can by their mere declaration make a particular use of property a nuisance which is not so, and subject it to the ban of absolute prohibition. *Yates v. Milwaukee*, 10 Wall. 497, 19 L. Ed. 984.

"If the presence of a store in a residence district of the city is a hurtful thing, so much so as to warrant its proscription of law, certainly it is not rendered less harmful by the fact that three-fourths of the property owners of the immediate area—many of whom may not reside there at all, consent to its presence. Yet, this ordinance, while treating the presence of a store as so injurious to the public as to justify the extreme penalty of its absolute prohibition, recognizes that if a certain number of

property owners of the district approve of its presence, all of its injurious properties will disappear.

"This feature of the ordinance, in our opinion, reveals its true purpose. It reveals with reasonable clearness that its object is not to protect the public health, safety or welfare from any threatening injury from a store, but to satisfy a sentiment against the mere presence of a store in a residence part of the city.

"It is doubtless offensive to many people for a store to be located within a given area where they own residence property. Others would possibly regard the store as a convenience. An aesthetic sense might condemn a store building within a residence district as an alien thing and out of place, or as marring its architectural symmetry. But it is not the law of this land that a man may be deprived of the lawful use of his property because his tastes are not in accord with those of his neighbors. The law is that he may use it as he chooses, regardless of their tastes, if in its use he does not harm them. Under the common law and in a free country a man has the unqualified right to erect upon his land non-hazardous buildings in keeping with his own taste and according to his own convenience and means, without regard to whether they conform in size or appearance to other structures in the same vicinity, even though they may tend to depreciate the value of surrounding improved and unimproved property. *Bostock v. Sams*, 95 Md. 400, 52 Atl. 665, 59 L. R. A. 282, 93 Am. St. Rep. 394."

We have quoted at length from this well considered case because we feel the conclusion there reached is absolutely sound, sustained by unimpeachable logic, and

also because in later decisions of the Texas court and in the decisions of the courts of other states, this opinion has been referred to as enunciating fully and clearly the limitations of the police power in respect to the use of property by the owners thereof for purposes which cannot and will not harm anyone. This case has been followed by the Texas courts in subsequent decisions where the ordinance of Dallas had been amended so as to omit that feature of the ordinance involved in the Spann case, which required the consent of adjacent property owners for the use of the property, and where the ordinances involved were practically identical with the one in the case at bar.

Marshal v. City of Dallas, 253 S. W. 887;
City of Dallas v. Urbish, 252 S. W. 259;
City of Dallas v. Burns, 250 S. W. 717;
Marshall v. McElroy, 254 S. W. 599;
City of Dallas v. Mitchell, 245 S. W. 944.

An ordinance similar to the one here involved was held unconstitutional by the Supreme Court of the state of Missouri in the case of *State Ex Rel Penrose Inv. Co. et al. v. McKelvey*, 256 S. W. 474, and the court very clearly distinguishes between the police power, which was relied upon to sustain the constitutionality of the ordinance, and the right of eminent domain. The court said:

> "It will suffice here, therefore, to say that the police power may be defined as extending to the protection of the public health, morals and safety, and to the promotion of the general welfare; while that of eminent domain extends to the taking from

the owner of property or an easement therein and applying it to a public use or enjoyment—compensation to the owner being a constitutional prerequisite to the exercise of this power. *A further distinguishing feature is that the effect of the police power is to restrict a property right as harmful while that of eminent domain is to appropriate a property right because it is useful.*" (Italics ours.)

The court further stated:

"In conclusion it is deemed pertinent to add in a general way that the necessity for the existence of civil government lies in the protection it affords to the rights of the individual. Laws enacted for this purpose, by which the government manifests its power, are necessarily more or less restrictive in their nature. They should therefore embody in their terms evidence that they will at least not lessen if they do not add to inalienable rights. That enactments in the exercise of the police power are restrictive in character does not admit of argument. Unless, therefore, it can be shown that they add to or tend to make an addition to fundamental rights, they are not justified."

In the cases of *St. Louis v. Evraiff*, 256 S. W. 489, and *State Ex Rel Better Built Home and Mortgage Co. v. McKelvey*, 256 S. W. 495, the same ordinance was again before the court, and again held unconstitutional.

In the case of *State Ex Rel Better Built Home & Mortgage Co. v. Davis*, 259 S. W. 80, the Supreme Court of Missouri had before it the question of whether or not a proposed zoning plan and zoning ordinance, and a statute of the Legislature under which said plan and

ordinance could be adopted and used by municipalities, was valid. The court reaffirmed the cases above cited and held the proposed plan, ordinance and statute unconstitutional.

It is often asserted by the proponents of zoning that the courts of Iowa have taken an attitude in favor of zoning, and have sustained comprehensive zoning ordinances, and cite as authority therefor, the case of *Des Moines v. Manhattan Oil Co.*, 193 Iowa 1096, 184 N. W. 823, 23 A. L. R. 1322. That case involved the validity of an ordinance which prohibited the erection of certain classes of business structures and the conduct of certain businesses within residential areas without a permit from the city council. The question involved was whether or not the city council had properly refused to grant a permit for the erection of a gasoline station. All of the cases cited by the court and relied upon by the court were cases involving nuisance occupations, and it is clear that the maintenance and conduct of a gasoline station is properly classified as a nuisance occupation or one likely to become such. The court, in its decision, specifically points out that the ordinance is not prohibitory but merely regulatory in that it required a permit before certain structures could be erected. *In a subsequent case* the Supreme Court of Iowa very clearly indicated that if the harmful and obnoxious features attendant upon a garage business or the maintenance of a gasoline station were not present, and if the business sought to be conducted was harmless and inoffensive, a municipality could not prohibit the same in any specified area under the police power. This case is the case of

Rehman v. Des Moines, 204 N. W. 267, 40 A. L. R. 922. In that case, after a permit had been granted for the erection of a store building in a residential district, the permit was revoked. A statute gave municipal authorities zoning powers, but there had been no specific action taken by the municipal authorities under the statute as by the passage of an ordinance. In speaking of the power which might be exercised under the statute, the court said:

> "So long therefore as municipal bodies confine their enactments, providing for the regulation and control of the kind or nature of buildings that may be erected upon property privately owned, and the use to which the same shall be put, within the proper limits of such power, they do not violate the property rights of the individual. The limit imposed is that the requirements, whatever they may be, must be reasonable, and for the protection of property, the public morals, or the welfare of the inhabitants of the community.
>
> "* * * On the other hand, it has been held that cities may not declare a retail grocery store to be a nuisance *per se,* or prohibit the erection thereof in a residential district solely because it offends the aesthetic taste of those residing in the vicinity. *People ex rel Friend v. Chicago,* 261 Ill. 16, 49 L. R. A. (N. S.) 438, 103 N. E. 609, Ann. Cas. 1915 A, 292. To same effect see *Fitzhugh v. Jackson,* 132 Miss. 585, 33 A. L. R. 279, 97 So. 190.
>
> "* * * *The authority, delegated to municipalities to impose building restrictions and regulations does not carry with it the authority to arbitrarily prevent the owner from improving his prop-*

erty. Independent of the power to regulate and enact restrictions, the owner of property has the absolute right to improve it and use it in any lawful way or for any lawful purpose. In other words the authority conferred upon the municipality is to restrict and regulate, and not prohibit." (Italics ours.)

The Supreme Court of the state of Mississippi in the case of *Fitzhugh v. Jackson*, 132 Miss. 585, 97 So. 190, had before it an ordinance which required the consent of neighboring property owners in a residential area before a business structure could be erected therein. The building sought to be erected was a grocery store. The court did not discuss the validity of the ordinance on the narrow ground of whether or not it was an unlawful delegation of the police powers to a portion of the people of a municipality, but held the ordinance unconstitutional on the broad principle that a municipality could not prohibit a property owner from using his property for harmless and inoffensive purposes and uses. Among other things, the city urged that a store sold many commodities which were injurious to children and that thus the ordinance was for the protection of children and that stores detracted from the beauty of residential districts and depreciated property values; that the privacy of residences would be destroyed, debris would accumulate and unpleasant odors emanate from stores; that it would create an increase in traffic on the street in front of stores. The court said:

"While a grocery store is most probably undesirable for neighboring residents, as stated by appellee, it is also probably true, as also stated by appellee, that it might be very attractive to children,

but it is perhaps the primary duty of the parents to prevent these children from these over indulgences. It is not contended, of course, and cannot be, that the proper operation of a business—a mercantile business, a dry goods store, or a retail grocery store —is a nuisance *per se*. If properly and lawfully operated, it will not become a nuisance. If unlawfully operated, such as to become a nuisance, there is a legal way for it to be suppressed or abated."

The court then referred to cases arising in other jurisdictions and continued:

"Referring to them generally, we might say that, while there are authorities from other states which would sustain the validity of this ordinance, we think the weight of authority and the better reasoned cases are to the effect that such a sweeping ordinance as the one here is not a valid exercise of the police power of the municipality. * * *."

The same court in the case of *Quintini v. Bay St. Louis,* 64 Miss. 43, 60 Am. Rep. 62, 1 So. 625, in declaring unconstitutional an ordinance which prohibited the erection of certain classes of buildings on certain property so that other property owners might have an unobstructed view of a river, used the following language:

"The law can know no distinction between citizens because of the superior cultivation of one over the other. It is with common humanity that legislatures and courts must deal, and that use of property which in all common sense and reason is not a nuisance to the average man cannot be prohibited because repugnant to some sentiment of a particular class. That the Legislature, in the exercise of the

police power, may prohibit in particular localities such use of property as is injurious to public health is admitted, and what it may do may also be authorized to be done by local authorities; but it does not follow that it may, by mere declaration, convert the harmless, proper and ordinary use of property into a nuisance."

In New Jersey there have been a large number of cases holding zoning ordinances unconstitutional. In the various cases the courts of that state have had before them, practically every consideration has been presented which the ingenuity of the proponents of the zoning ordinances have evolved in an attempt to cause the courts to hold that zoning is properly referable to the police power. The most cited case, and the one cited by the courts of New Jersey in subsequent decisions as holding zoning unconstitutional, is the case of *Ignaciunas v. Risley,* 121 Atl. 782. The court said:

"The right to acquire property, to own it, to deal with it and to use it, as the owner chooses, so long as the use harms nobody, is a natural right. This does not owe its origin to constitutions. It existed before them. *Spann v. Dallas,* 111 Tex. 350, 235 S. W. 513, 19 A. L. R. 1387. It is, however, a right guaranteed by our constitutions. It is a right necessary to the existence of organized society. The protection of this natural right is one of the reasons which prompted men to form governments.

"* * * With the right of ownership and possession goes the right to use, enjoy and dispose of the property owned. The substantial value of property lies in its use. If the right of use be denied, the value of the property is lessened or destroyed.

> A law which forbids a certain use of property deprives it of an essential attribute. The result in effect is a prescription of its ownership. *Spann v. Dallas, supra.* The defendants, however, say that the right of private property is subject to the police power of the state and must yield to such measures as are designed to promote the public health, safety, and general welfare of a community. This, as a general proposition, is true. But the police power is based upon public necessity, and only public necessity can justify its use. The abridgment of the rights of an individual is the usual result of its exercise. It should never be exercised unless it is clear that the object to be attained is so essential to the public health, safety and welfare as to fully justify its exercise."

The court then tested the ordinance for the purpose of ascertaining whether or not its restrictions were essential to public health, safety and welfare, saying that unless the proposed use of the property for store purposes would endanger these things the abridgment of such use was an invasion of the rights of the owner. After holding that none of the factors necessary to the enactment of the police measure were present, the court said:

> "We see no relation between stores and noise. It is a matter of common knowledge that during most of the days of a week stores are closed early in the evening and no noise emanates from them while the occupants of many private homes spend the evening and sometimes the morning hours in the playing of musical instruments, which prevents their neighbors from obtaining thorough sleep, repose, and refreshment. * * * Some stores are noisy; some are quiet. The same is true of homes."

This case was affirmed by the Court of Errors and Appeals of New Jersey in 125 Atl. 121. While the Court of Errors and Appeals did not affirm the case in its entirety, holding that it was not necessary to determine the fundamental principles laid down in the decision of the Supreme Court, nevertheless it did hold that legislation of that character did not promote the public health, safety or welfare and that therefore the ordinance was not within the power of the city to enact under a statute giving municipalities the right to enact legislation to promote the public health, safety and general welfare. However, in the case of *Plaza Hotel Co. v. Hague*, 126 Atl. 421, the Court of Errors and Appeals affirmed a decision of the Supreme Court, which was based entirely upon the Supreme Court decision in the case of *Ignaciunas v. Risley, supra.*

In *Eaton v. Village of South Orange*, 130 Atl. 362, the court held that the mere fact that the city lacked necessary fire equipment and could not give proper fire protection, if stores were in residential areas, did not justify the city in prohibiting a property owner from using his property for harmless and inoffensive business, nor did the fact that traffic congestion might be increased justify the ordinance.

See, also:

H. Krumgold & Sons v. Jersey City, 130 Atl. 635;

Ingersoll v. South Orange, 128 Atl. 393, affirmed 130 Atl. 721;

Franklin Realty & Mortgage Co. v. Village of South Orange, 132 Atl. 81;

Handy v. Village of South Orange, 118 Atl. 838.

In the case of *Goldman v. Crowther,* 128 Atl. 50, the Court of Appeals of Maryland had before it the question of whether or not petitioner was entitled to a writ of mandate to compel the issuance to him of a permit to use the basement of a building situated in a residential area in the city of Baltimore, for a tailor shop. The Baltimore ordinance was very similar to the one here involved, in that it purported to zone the entire city of Baltimore into various use districts, in some of which it was proper to conduct business, in others, business enterprises were forbidden and dwellings permitted, and in others, certain kinds of dwellings alone were permitted. The court comprehensively reviews the decisions in the state of Maryland and other jurisdictions involving similar questions, and says:

> "The question can be approached by either of two avenues; one legal; the other, political and sociological. * * *
>
> "Which one of these two methods of approach should be used in this case is a question which goes to the root of our system of government; but without referring further to that, it is sufficient to say that, in our opinion, we are not at liberty to examine the question from any other than a legal standpoint, *and therefore we cannot be controlled in our consideration of the validity of this ordinance by its possible benefits to the public, if in point of fact that benefit is purchased by appropriating the rights of individuals to the public use without just compensation, and by the violation of the guarantees of the State and Federal Constitutions* * * *." (Italics ours.)

The court then analyzed the ordinance in great detail and decided that inasmuch as none of the provisions thereof related to the manner in which dwellings could be constructed, whether of fireproof material or otherwise, or the manner in which the use was conducted, that the restriction was wholly arbitrary and had no logical relation to the public welfare or any of the other matters properly referable to the police power, and held that insofar as the ordinance prohibited the use of petitioner's property for a tailor shop, it was unconstitutional and contrary to the provisions of the State and Federal Constitutions prohibiting the taking of property without due process of law and just compensation.

See, also:

Byrne v. Maryland Realty Co., 129 Md. 202;
Bostock v. Sams, 95 Md. 500, 52 Atl. 665;
Stubbs v. Scott, 127 Md. 86, 95 Atl. 1060.

In Delaware the leading case is that of *Mayor and Council of Wilmington v. Turk*, 129 Atl. 512, where the court had before it the question of whether a municipality could prohibit, in a residential area, the maintenance of a private hospital for the treatment of non-infectious diseases. The court held that the business sought to be conducted was not a nuisance and under the evidence would not be detrimental to the health, morals, safety or general welfare of the public, and that therefore the ordinance was unconstitutional and void.

In *Willson v. Cooke*, 130 Pac. 828, the Supreme Court of Colorado had under consideration an ordinance of the city of Denver making it unlawful to erect on certain

designated streets, apartments, flats, store buildings or hotels. The ordinance also provided for a set back for buildings from the property line. The petitioner in the case applied for a permit to construct a store building, which was denied. The proceeding was in mandamus and the court, in holding the ordinance invalid, said:

> "The building which petitioner proposes to erect complies with all ordinances regarding the materials to be used in its construction. The lots upon which it is proposed to erect it front upon an ordinary street. The store building is in no sense a menace to the health, comfort, safety or general welfare of the people, and this is true whether it stands upon the rear portion of the lots upon which it is erected or is constructed to the lines of the street. But even if it could be said that its construction imperiled or threatened harm to others, such objection could in no sense be removed by the consent to its construction by the majority of the property owners in the block. A store building in a residence section of the city is not desirable from the aesthetic point of view, but restrictions for this purpose alone cannot be upheld, as it is only those having for their object the safety and welfare of the public which justifies restrictions on the use of the property by the owner."

In the state of Ohio the courts have taken an attitude opposed to the validity of ordinances of this character. In the case of *City of Youngstown et al., v. Kahn Bros. Building Co.*, 113 Ohio State 17, 148 N. E. 842, the court had before it the question of whether the City of Youngstown had the power to create a district in which only single or two-family dwellings could be erected. The court said:

"A positive prohibition is imposed by the ordinance upon the erection of an apartment house upon residence territory within the district. Thus the owner is substantially deprived of the use of his property. * * * The police power, however, is based upon public necessity. There must be an essential public need for the exercise of the power in order to justify its use. * * *. It is commendable and desirable, but not essential to the public need, that our aesthetic desires be gratified. Moreover, authorities in general agree as to the essentials of a public health program, while the public view as to what is necessary for aesthetic progress greatly varies. * * * Successive city councils might never agree as to what the public needs from an aesthetic standpoint, and this fact makes the aesthetic standard impractical as a standard for use restriction upon property. The world would be a continual seesaw if aesthetic considerations were permitted to govern the use of the police power. We are, therefore, remitted to the proposition that the police power is based upon public necessity and that the public health, morals or safety, and not merely aesthetic interest must be in danger in order to justify its use."

In speaking of the right of a municipality to exclude from residential areas, stores or other non-nuisance business, the court said:

"We see less reason for excluding an apartment house from a strictly residence district than for excluding a store or other business of a non-nuisance character from a strictly residence district. Ordinances prohibiting the establishment of a non-nuisance business within a residence district have frequently been held unconstitutional upon the

ground that they constitute a taking of private property without compensation."

In *Pritz v. Messer et al.*, 113 Ohio State 89, 149 N. E. 30, the court purports to draw a distinction between the so-called comprehensive zoning ordinance and a district ordinance of the character involved in the *Kahn case, supra.* However, this discussion is merely dicta and not necessary at all to the decision of the case, as the court found that the defendant was exempt from the provisions of the ordinance because he had a permit prior to its passage. Moreover, the court's discussion proceeded upon the assumption that there would be a proper exercise of the police power and that the laws and the regulations would be reasonably necessary for the preservation of the public health, safety and morals. Of course any distinction between a so-called district ordinance, in which only a part of a city is zoned, and a comprehensive ordinance, in which an entire city is zoned, is, and must necessarily be, imaginary. A wrong committed by wholesale is none the less a wrong, and if only a portion of the property owners in a city are prohibited from using their property for lawful purposes, as to them the ordinance is just as invalid as though all of the people in the city were subjected to similar and like restrictions. By whatever means a municipality attempts to restrict a property owner in the use of his property for lawful uses, whether by an ordinance affecting only particular property, or by a so-called comprehensive ordinance, involving all of the property of the city, the action nevertheless must be invalid where it transgresses and violates the guaranties of the Federal

Constitution. Every individual citizen is protected by the guaranties of the Fourteenth Amendment. No individual citizen whose guaranties are challenged, may be denied the right to resist encroachment.

In the case of *Ambler Realty Company v. Village of Euclid,* 297 Fed. 307, the zoning ordinance of the Village of Euclid, a municipal corporation of the state of Ohio, was involved. This case is now before your honorable body for decision, and a discussion of the opinion of the District Court would be a mere repetition of matters with which your honorable body is familiar. We do, however, feel that the District Court in that case admirably sets forth the doctrines which must be adhered to if our Constitution is to survive.

In the late well considered case of *Smith v. City of Atlanta,* 132 S. E. 66 (Advance Sheets), the Supreme Court of Georgia had before it a similar zoning ordinance. The question involved was whether the act amending the charter of the City of Atlanta and the zoning ordinances passed pursuant thereto, were constitutional. The plaintiff in the case applied for a permit to erect a retail store building on property zoned for residential purposes, and upon refusal, proceeded with the construction of the building. She was thereupon arrested and an action to enjoin the proceedings on the part of the city was commenced. The court follows the rule laid down in the case of *Spann v. Dallas, supra,* and quotes extensively from that case, and others, which hold that ordinances of this character are unconstitutional and says:

> "And from what we deem sound reasoning in the adjudicated cases holding that it is not within the

power of the Legislature to authorize a municipality to enact, in the form of an ordinance, a prohibition against an erection of such buildings as are in question here, upon property bought without restrictions, we have reached a conclusion in harmony with those decisions and are compelled to dissent from the decisions rendered by highly respectable courts holding the contrary."

The court adhered to this ruling in *Morrow v. City of Atlanta*, 133 S. E. 345, (Advance Sheets).

We submit that the conclusions of the courts of those jurisdictions, which hold that municipalities cannot, under the police power, enact ordinances restricting the use of property against harmless and inoffensive business enterprises and permitting in certain districts only such uses as the municipal authorities may, from time to time, decree, afford the only rulings which have any basis in either law or logic. It is useless to say that these zoning ordinances decrease the fire hazard in a city. A fireproof constructed Class "A" building used for store purposes is certainly less hazardous from the viewpoint of fire than a frame wooden building, whether a single family dwelling, tenement house, apartment house, or other kind of a dwelling. As far as filth and rubbish are concerned, without proper regulations they may accumulate as readily in an apartment house or private dwelling as in a store or an office building. The go and come of traffic may be *regulated* under the police power. New avenues for its use may be provided through the medium of eminent domain. But it is a most surprising doctrine,

as dangerous as it is novel, that a man may be denied a beneficial, although absolutely harmless, use of his property simply because such use might give offense to his neighbors in virtue of the larger amount of traffic thereby encouraged to travel upon that particular street. It has long since been announced from an authoritative source (*Wheatley v. Chrisman,* 24 Pa. St. 298) that one man's necessities are never the measure of another man's rights. *A fortiori,* one man's aesthetic preferences may never become the measure of another man's rights.

Nor will zoning ordinances promote or perpetuate the American home or the ideals of the American nation, as there is nothing in them requiring any such result. As a matter of fact, paternal legislation of this character is obnoxious to and destroys what has heretofore been considered fundamental doctrines of liberty and freedom, the right of a citizen to own, use and dispose of his property as he sees fit, so long as he does not injure his neighbor. If the zoning power asserted in this ordinance can be sustained, then the right of private property has ceased and individuals hold the bare legal title with the control of the use thereof in the hands of the state, and subject to the passing whims and fancies of the governing bodies. Such paternalistic doctrines have not existed among the English speaking nations since the abolition of the feudal system until of recent years when there has been an attempt to establish in this nation the doctrines of communism and the communal control of property. If the state can obtain, without paying com-

pensation, by means of legislation of this character, the control of the most beneficial attribute of property, to-wit, the use thereof, then it is but a short step to the assertion on the part of the state of the right to the entire title to property. "You take my house when you do take the prop that doth sustain my house."

Even though enacted pursuant to the wishes of the dominant majority in a given city that is not sufficient to justify the enactment of these ordinances, for as stated by this court through Mr. Justice Miller in the case of *Saving & Loan Assn. v. Topeka,* 20 Wall. 655; 22 L. Ed. 455:

> "It must be conceded that there are such rights in every free government beyond the control of the state. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism. It may well be doubted if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many."

II.

That the Supreme Court of the State of California Erred in Holding That Under the Findings of the Referee, Restrictions and Prohibitions Placed Upon the Property of Plaintiffs in Error by Said Ordinance, Were Reasonable and Not Discriminatory, and Were, Under the Particular Facts and Findings, a Valid Exercise of the Police Power, and Were and Are Constitutional and Not in Violation of the Constitution of the State of California, and of the Constitution of the United States, and in Particular the 14th Amendment Thereto, and That Said Restrictions and Prohibitions Do Not Discriminate Against Plaintiffs in Error, and Did Not Deny to the Plaintiffs in Error the Equal Protection of the Law.

As hereinbefore set forth, Wilshire Boulevard is a public street, commencing at Westlake Park, in the westerly portion of the City of Los Angeles, and extending therefrom a distance of approximately five miles, to the westerly corporate limits of the city. Thereafter it continues as a traffic thoroughfare through the county of Los Angeles and other municipalities to the City of Santa Monica and the Pacific Ocean. For the purposes of this discussion it may be divided into two sections, the first of which comprises that portion of Wilshire Boulevard which lies in the older residential section of the City of Los Angeles. In this section, years ago, many magnificent homes were built, and prior to the advent of the automobile as a popular means of transportation, it remained a street well built up to beautiful

residences. This section may be described as that portion of the street commencing at Westlake Park, and extending a distance of approximately two and one-half miles to an intersecting street known as Rimpau Boulevard. At the time of the commencement of this action, and for some time prior thereto, the property fronting upon Wilshire Boulevard in this older section had undergone and is still undergoing a change in that many of the formerly exclusive homes and residences had been transformed into boarding houses, lodging houses, tea rooms and restaurants. A number of fine residences had been moved away, and many oil and gasoline stations installed at different places. [R. p. 52.]

At the time of the commencement of this action, throughout this section of Wilshire, four or five large apartment houses were under construction. The Ambassador Hotel had been built, containing a number of stores and shops. On at least two corners, to-wit, Vermont and Western avenues, business sections had been zoned and business houses constructed. In brief, this older section of Wilshire Boulevard was and is undergoing a transformation from an exclusive residential section to a business and near-business district, and this despite the prohibitions and restrictions of the zoning ordinance. [R. p. 52.]

The second section of Wilshire Boulevard extends from Rimpau street, west to the city limits, a distance of approximately two and one half miles, and it is near the center of this section that plaintiffs' property lies. There is not throughout this entire section, upon any of the property fronting upon Wilshire Boulevard, a hotel,

apartment house, lodging house, tenement house, nor a residence of any type or description. [R. p. 46.] The few structures found there are entirely devoted to business; were placed there prior to the adoption of the zoning ordinance, and at a time when the territory through which this second section of Wilshire runs, was almost entirely undeveloped. [R. p. 46.] The property of plaintiffs in error lies on the southerly side of Wilshire, and occupies an entire block between Dunsmuir and Cochran streets. It was subdivided as business property before the territory within which it lies, was annexed to the City of Los Angeles. It was originally sold as business property and resold as business property, and for some time after annexation to the City of Los Angeles it, together with property on either side, for a distance of several blocks, continued to be held and sold as business property, and upon some of this property business buildings were constructed, as, for example, the construction of a brick store building on the opposite corner of Cochran and Wilshire, and the construction of a real estate office upon plaintiffs' property. [R. p. 46.]

The question then presented is whether or not the restrictions of the zoning ordinance in question are reasonable with reference to plaintiffs' property located as it is, upon Wilshire Boulevard, where for more than a mile in either direction there is not a single residence or dwelling of any type or description, nor other structure permissible under the provisions of the ordinance; where, as a result of this ordinance, plaintiffs' property and other property, has been depreciated in value, and where, as the evidence shows, to which we will later advert, the

natural and logical development of the property, and character of the street as a traffic artery, make it a most undesirable section for residences, and a highly desirable one for business. We assert that this ordinance is unreasonable:

First: Because It Changes the Character of the Property by Prohibiting Its Use for the Purposes for Which It Was Originally Intended, for Which It Was Subdivided and Sold, and by Reason of Existing Conditions Is Adapted.

The findings of the referee show that the tract within which plaintiffs' property is located was subdivided prior to becoming a part of the City of Los Angeles by annexation, without restrictions as to its use, and was placed upon the market for sale as property upon which business structures might be constructed and mercantile establishments conducted, and was actually sold as business property [R. p. 43]; that this was true also of all other property adjoining plaintiffs' property, both to the east and to the west, for several blocks. [R. pp. 43 and 44.] The referee's findings also show that this territory in which the plaintiffs' property lies, was annexed to the City of Los Angeles in February, 1922, and from that time on, the property in question remained business property, was sold as business property, and some of it actually devoted to business uses and purposes prior to the adoption of Ordinance 44,668 (N. S.), which amended Ordinance 42,666 (N. S.) by adding Part No. 7 to the zone map, and transforming this district from a business district into one which could only be developed

with the structures permitted in Zone B. This occurred in September, 1922. [R. p. 45.]

Thus we see that the plaintiffs' property, as well as other property adjacent thereto for a number of blocks on Wilshire Boulevard, was, prior to annexation to the City of Los Angeles, subdivided and sold for business uses and purposes; that after becoming a part of the City of Los Angeles it remained business property, and the only development was for business uses and purposes during a period of nearly a year which elapsed before the adoption of these ordinances endeavoring to change its character by prohibiting its further development for business. We assert this action was arbitrary and unreasonable. Nothing had occurred in the way of development or otherwise upon any portion of Wilshire Boulevard throughout its entire length to warrant, demand or justify this change. Not a single residence of any type had been constructed upon it. During this entire period not a single apartment house, hotel, lodging house, tenement house, or any other kind of structure, permitted only in Zone B districts, had been built upon any part of the frontage upon Wilshire within a mile in either direction from plaintiffs' property. Why, then this change from a business district to a residence district? What were the reasonable circumstances which warranted this drastic action? We assert that there were none, and the record fails to disclose the existence of any.

While we are aware that the statutes of the state of California are not in any respect binding upon the court in the determination of this question, yet we feel that the

act of the California Legislature regarding the enactment of zoning ordinances by municipalities may be highly persuasive in the determination of those things which may or may not be reasonable factors in the zoning of property. The building zone act of 1917, Stats. 1917, p. 1419, Deering's General Laws of California (1923), page 369, provides as follows:

> "The Council shall give reasonable consideration, among other things, to the character of the district, its particular suitability for particular uses, the conservation of property values, and the direction of building development, in accordance with a well considered plan."

The finding of the referee is that along Wilshire Boulevard, within one mile in either direction from property of plaintiffs in error, there is not located a single structure of any kind permissible under "B" Zone (the existing ordinance), and the only kind of structures (and there are a considerable number) are those of a business nature which were erected before the property was placed in "B" Zone, and all the development that has been made in this vicinity has been for uses permissible under "C" Zone, and since the prohibitions of "B" Zone have been applicable, all the property has remained static and frozen.

It is obvious, therefore, that if the recitals of the statute are at all indicative as to what constitutes a reasonable zoning law, the City Council of the City of Los Angeles, in enacting this particular ordinance, failed to follow it by giving reasonable consideration to the character of the district which it zoned against use for busi-

ness. It arbitrarily disregarded the obvious and known fact that the property had been business property subdivided and sold as such, and to some extent at least, improved for business purposes. The Supreme Court of the state of California, in rendering its decision, also completely overlooked, these circumstances in considering the reasonableness of this ordinance, for we find no reference whatever in the opinion to the fact that the property in question, as well as other property, had in the manner aforesaid, acquired a fixed status as business property.

Second: The Ordinance Is Further Unreasonable in That It Disregards Traffic Conditions, Which Manifestly Makes the Property of Plaintiffs in Error, as Well as Other Property Upon the Wilshire Boulevard More Desirable for Business Uses and Purposes Than for the Uses and Purposes Permitted by the Ordinance.

The referee found that Wilshire Boulevard is a main artery for a tremendous amount of automobile traffic between the City of Los Angeles and other communities; that at all hours of the day and most of the hours during the night it is filled with traffic of every description, including commercial vehicles engaged in commerce between the City of Los Angeles and said other communities; that Wilshire Boulevard is one of the main arteries of travel in the City of Los Angeles, *and that said automobile traffic creates a great deal of noise, confusion and congestion upon said boulevard in the vicinity of plaintiffs' property* and for long distances in either

direction from this property. [R. pp. 45, 46.] This, we assert, is in itself sufficient to establish the unreasonableness of an ordinance which condemns property fronting upon such a boulevard to uses only of the character permitted by the ordinance in Zone B.

This traffic condition is unquestionably the reason why the former high class residential section fronting upon Wilshire Boulevard in the older portion has undergone the change heretofore adverted to. Anyone who has ever had the misfortune to live in a home, an apartment house or a hotel fronting upon a boulevard filled with noisy traffic during the day and night, will readily appreciate the undesirability of such property for a residence. It is undoubtedly the reason why Wilshire did not continue as a residential street westward from Rimpau, and why, since the adoption of this ordinance restricting the use of property on Wilshire to residential development, none of the property owners have taken advantage of the benefits of the ordinance to construct residential buildings of any character upon the property.

On the other hand, it is well known, and this is especially true of Southern California, where many people shop by automobile, that business follows traffic and that stores and mercantile establishments spring up solely by reason of the trade which they receive from the thousands of people who pass by daily and stop to patronize them. The very existence of this traffic which makes property upon highways undesirable for residences, makes it highly desirable for business purposes.

But, says the Supreme Court of the state of California:

> "This is not necessarily proof that the boulevard is fit only for business. The requirements of a traffic boulevard are that traffic shall be kept moving, whereas it is common knowledge that on business streets traffic is retarded. * * *"

We submit that the Supreme Court of the state of California has entirely confused the issue. *The ordinance in question is not a traffic ordinance regulating traffic.* It is an ordinance restricting property against particular uses and the test is whether the property is adapted and fitted for these uses, not whether such uses will interfere to some extent or at all with the rapid movement of travel upon the street upon which the property fronts. If the City Council of the City of Los Angeles has power to zone property against particular uses in order to preserve a particular boulevard or street as an artery for traffic to move without interference or retardation, it could, with equal reasoning and for similar cause, prohibit entirely the use of the property fronting upon it.

We submit that no good reason exists for denying to the owners of this property the right to use it for the purposes for which it is best adapted, even though, as a consequence, residents of outlying communities and other municipalities may be delayed slightly in the speed of their travel to the City of Los Angeles over Wilshire Boulevard.

Furthermore, this ordinance contemplates that the street will build up to large hotels, tenements, lodging and apartment houses, with the result that the traffic upon this boulevard will be retarded just as much as if

the property had been built up to inoffensive business establishments. Anyone who has traveled Wilshire Boulevard and noted the large number of automobiles parked and passing in front of, and coming in and out of, the Ambassador Hotel grounds, and the congestion occasioned thereby will readily appreciate that improvements of this character are just as destructive of the usefulness of this boulevard as a main artery for rapid transit as ordinary business houses would be.

Third: The Fact That the Owners of This Property Have Not Constructed Any Buildings of the Class Permitted by the Ordinance, When Every Other Street Within the City of Los Angeles During a Corresponding Period Has Been Heavily Built Upon, Is Proof Positive That It Is Not Adapted for the Purposes Permitted.

The findings of the referee show that no buildings or structures of the kind permitted in Zone B have ever been built upon any of the property fronting upon Wilshire Boulevard between Rimpau street and the city limits, a distance of nearly three miles. None were constructed prior to the adoption of this ordinance; none have been built since it went into effect, and aside from previously built business places every foot of property, for that entire distance, has been allowed to stand idle, covered only with weeds, real estate signs and billboards, save only in that particularly favored section where, under the ordinance, for a distance of two blocks, at the intersection of La Brea street, the property has been

placed in Zone C. This, despite the fact that the surrounding territory has undergone a tremendous building development. The appearance of Wilshire Boulevard at the present time, throughout this territory, is that of a lane flanked by vacant land, while to the north and to the south and completely surrounding it, the territory has been and is being built up with startling rapidity. If this property is better fitted for the purposes for which it is zoned; if in the language of the Supreme Court of the state of California it is as well adapted to residences of the kind permitted, why is it that not one owner has taken advantage of this ordinance to build a single structure of the kind permitted? Why is it that only business houses constructed before the provisions of this ordinance put a stop to further development, lie upon the property fronting on Wilshire Boulevard in this section? Why is it that the only building of any character since its adoption has been within the favored district at La Brea, where the property has been placed in Zone C, and open to business construction? Why is it that every other street in the City of Los Angeles, no matter how remotely located or poorly improved as a passable highway, has had its share of development? The reason is obvious, and every man, woman and child in the City of Los Angeles knows it. It is because the property upon Wilshire Boulevard is not fitted for residential development—because it has its highest use in business development; because it is worth a great deal more for business uses than any other, and no owner of property dares to sacrifice it to a use for which it is not adapted, and from

which no adequate return would be received. It is true that some of the property lying away from the property of plaintiffs in error has been restricted by deed to residential use for a period of time. These restrictions were placed there years ago by the original subdividers, when it was thought that the residential development then existent in the older sections of Wilshire Boulevard would continue. But even this property is wholly unbuilt upon for any of the purposes for which it was restricted both by deed and by ordinance. The property of plaintiffs in error, however, as has been heretofore pointed out, is not restricted by deed nor is the adjacent property for a distance of many blocks in either direction, restricted by deed.

The Supreme Court of the state of California, however, says that the fact that this property was largely unoccupied, there being within the area but one store building, an oil station, and a few real estate offices (which statement is inaccurate, as we shall later show), shows that the region was not unsuitable for residential purposes. If this be true, why is it that its suitability for residential purposes through all these years has not been evidenced by development of that character? The fallacy in this argument is obvious. It is largely unoccupied because plaintiffs in error and other owners are prevented from building by this ordinance. Give us a chance and we will readily prove for which uses the property is best adapted.

Fourth: The Findings of the Referee Further Show That the Property of the Plaintiffs in Error Has Been Depreciated in Its Market Value From 100% to 200%, by Reason of Its Having Been Placed in Zone B Instead of Zone C [R. p. 46].

It is obvious that this is true, also, of all other property on Wilshire boulevard in the same section which is unrestricted by deed for business uses and purposes. "But," says the Supreme Court of the State of California, "this fact is not of controlling significance as every exercise of the police power is apt to affect adversely the property interests of somebody," overlooking, however, the provisions of the state statute which make the conservation of property values one of the primary tests of the reasonableness of zoning laws. If the property of plaintiffs in error, as well as all other property within the 14 blocks on Wilshire boulevard, which is unrestricted by deed against use for business, is to be depreciated in value from 100% to 200%, by reason of the restrictions of the zoning ordinance, it is manifest that the Council, in enacting such ordinance, has not followed the provisions of the statute in the conservation of property values. As a consequence, it must be manifest that, for this additional reason the ordinance is unreasonable. The only conceivable theory upon which zoning may be upheld as a police power measure is that it is justified by considerations of public welfare, which, manifestly, must be evidenced by some benefit to some one. How, may we ask, may public welfare be served by an ordinance which depreciates the property owned by those affected from one hundred to two hundred per cent without benefit to any one save only the favored

few who under the ordinance enjoy a monopoly of business property in that locality. It would hardly be urged even by the most rabid exponents of zoning that the benefits received by the owners of property on Wilshire boulevard at La Brea in having their property zoned for business and the monopoly enjoyed as a consequence are benefits which might by any stretch of the imagination be deemed to be considerations of public welfare. But aside from conferring benefits upon these favored few, the ordinance does not work a benefit but, on the contrary, only detriment, to any one.

The Supreme Court of California, however, while overlooking the above mentioned consequences, notes that the value of other property on Wilshire boulevard which has been restricted against use for business by deed will be depreciated in value if such restricted property be located in Zone "C"; but the court fails to mention or note a very significant fact found by the referee in connection therewith, to-wit, that such depreciation will continue only so long as such deed restrictions remain in effect [R. pp. 46-47]. Furthermore, it is manifest that such depreciation will only be temporary, for if business becomes actually established upon Wilshire boulevard, as is inevitable, if this ordinance should fall, these deed restrictions will be thereby rendered unenforceable as repugnant to the manifest adaptability of the property for use, and the property will thus, despite these restrictions, become available for business and immensely more valuable.

Again, it is obvious that if this property thus restricted by deed will be depreciated in value by placing

it in Zone "C", it may well be allowed to remain in Zone "B". Certainly its condition in this regard is no argument why the value of plaintiffs' property and that of others within the fourteen blocks heretofore mentioned should be practically destroyed, for, as we have heretofore pointed out, the property of plaintiffs in error does not lie within this section restricted by deed but within the center of the fourteen blocks originally subdivided for business, partially built up to business, and which has never been restricted by deed against business uses or purposes.

Fifth: The Development of Other Property to Business in the Immediate Vicinity of the Property of Plaintiffs in Error Creates a Condition Whereby It Will Be Impossible for This Property Ever to Become Desirable Residential Property of Any Character.

As we have heretofore shown, plaintiffs' property lies within two blocks of the area at LaBrea and Wilshire, where for a distance of one block in either direction the Wilshire frontage has been placed in Zone "C" and built up to business houses. Directly opposite plaintiffs' property, is a brick building occupied by mercantile establishments, the existence of which cannot be affected by the ordinance. There are also in the immediate vicinity many real estate offices built prior to the adoption of this ordinance. Manifestly, therefore, the immediate contiguity of business to plaintiffs' property, which in the one instance is authorized and in the other cannot be destroyed, makes plaintiffs' property wholly undesirable for any purpose except business.

We most respectfully insist that a reasonable man would not use petitioner's property for residential purposes for the following reasons:

(a) That there existed on Wilshire Boulevard the enormous amount of traffic resulting in the tremendous noise, dust and confusion at all hours of the day and night. [R. pp. 45, 46.]

(b) That all of the surrounding lots on every side had been sold for business purposes and all of the deeds therefor permitted such use. [R. p. 43.]

(c) That there was not another residential structure facing on Wilshire Boulevard within a mile in either direction of petitioner's property. [R. p. 46.]

(d) That lots in the immediate vicinity not fronting on Wilshire and therefore much more desirable for residential purposes could be secured for a much lesser price.

(e) That the market value of the property would be depreciated from one hundred to two hundred per cent when used for residential purposes. [R. p. 46.]

But, even though the above would not convince a reasonable man that petitioner's property was utterly useless for residential purposes, the further fact that business structures in immediate proximity to and on both sides of petitioner's property, placed there in the natural development of the property for business purposes before its obvious use was stifled by this zoning ordinance, and since maintained and operated for business uses under the very authority of this zoning ordinance, has most conclusively blighted the use of petitioner's property for residential purposes, and by the continuance of such existing establishments has definitely and forever placed

the stamp of business use upon this property. The facts are so overwhelming, the conditions so manifest, the conclusion so irresistible, that "he who runs may read."

Sixth: The Ordinance Is Further Unreasonable in That It Zones Property Against Use for Business When Such Property Is Located in a Territory Not Only Better Adapted for Business and Wholly Unadapted for Residences, But the Increasing Development of Which Shows a Direct Trend Toward Business.

This is illustrated not only by the fact that Wilshire boulevard is a traffic highway and that residential development withdraws therefrom as an inevitable consequence of the noise, congestion, confusion and positive danger which is incident thereto, but also because, as we have heretofore stated, business, which is inconsistent with residential development, follows traffic, especially in Southern California, where a large part of the shopping is carried on through the medium of the automobile. There is not a traffic artery in Southern California which does not show a falling off in residential and an increase in business development directly occasioned by this condition.

Within the area from Rimpau street to the city limits, there were at the time of the adoption of this ordinance nothing but business houses upon Wilshire boulevard. This is still the condition, despite the optimistic opinion of the California court that the property is suitable for residential uses. The adoption of this ordinance arrested Wilshire boulevard almost at the start of its business development so that as a consequence it still re-

mains, by reason of the legislative restrictions, largely unoccupied territory, but not before it began to show clear and unmistakable evidence of a distinct business development. The findings of the referee are that there were several real estate offices located on Wilshire boulevard near the property of plaintiffs in error; that directly across the street from the property of plaintiffs in error was a brick store building occupied by a grocery and a market; that at the intersection of La Brea and Wilshire boulevard there was a two-story brick business block, a real estate office, gas and oil station, and another real estate office (since the commencement of this action three additional expensive and large business buildings with many shops and stores have been built in the same block); that upon plaintiffs' property is a real estate office; that some distance east, at the corner of Wilshire and Mansfield avenue, is a fruit stand. All of this indicates the trend toward business in a territory on the eve of development, and which development has been arrested, if not completely destroyed, by the provisions of this ordinance.

To summarize, therefore, we have this situation: An ordinance has been adopted, zoning against use for business, the property of plaintiffs in error, which lies within the center of some 14 blocks of property on Wilshire boulevard, all of which is unrestricted by deed against use for business; that the ordinance prohibits the use of plaintiffs' property for the purposes for which it was originally subdivided, and for which it was placed upon the market for sale, and for which it was actually sold and paid for; that this property was zoned against busi-

ness despite the fact that it is located upon a traffic artery where the vehicular travel is so great as to make it wholly undesirable for residential uses, except, perhaps, to the peculiar or unfortunate few who do not mind, or who are compelled to tolerate the noise, confusion and congestion caused thereby; that it was and is zoned against business, despite the fact that it is located in the vicinity of an existing business center, where property is not only zoned to business, but actually built up to business; that it is zoned against business, despite the fact that its market value is thereby cut to one-half or one-third of that which it would have if unzoned or zoned for business; that it was and is zoned against business and for residential uses only despite the fact that none of the property has been or apparently ever will be used for such purposes; that it is zoned against business despite the fact that the result has been and will be that every owner will be compelled to allow his lands to be vacant and idle, covered with weeds and real estate signs, rather than to expand further in a development which cannot be profitably engaged in. If this be reasonable zoning we would indeed be curious to know what those responsible for it would consider unreasonable.

As may be noted, this cause was first heard as an original proceeding in mandamus in the District Court of Appeal of the State of California. Although the decision of the District Court of Appeal is not the law of the case, and has been completely superseded by the decision of the Supreme Court, we believe that the decision of the District Court of Appeal constitutes a masterly argument in our behalf in this case. Not only are the justices of that court jurists of recognized ability

but they had the additional advantage of being residents of the community in which the property lies, and were unquestionably personally familiar with the conditions. For this reason we are taking the liberty of quoting from the decision of the District Court of Appeal relative to the unreasonableness of this ordinance, the reasoning and conclusions of which are at direct variance with those of the Supreme Court.

The opinion was written by Presiding Justice Conrey, and concurred in unanimously by Justices Houser and Curtis, the two other members of the court. It is in part as follows:

> "Respondents contend that the City of Los Angeles derives its authority for the enactment of its zoning ordinance from section 11 of article XI of the Constitution of California, which reads as follows: 'Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws.' Petitioners, however, claim that the ordinance in question is not only an unreasonable attempt to exercise the police power delegated to the city, but that it also transgresses the limitations prescribed by a general law, viz., 'An Act to provide for the establishment within municipalities of districts or zones within which the use of property, height of improvements and requisite open spaces for light and ventilation of such buildings may be regulated by ordinance.' (Stats. 1917, p. 1419; Deering 1917-1921, Supp. to Gen. Laws, p. 1043.) This statute purports to authorize any city in the state to create or divide the city into districts, within some of which it shall be lawful, and within others of which it shall be unlawful to erect, con-

struct, alter or maintain certain buildings, or to carry on certain trades or callings, or within which the height and bulk of future buildings shall be limited. After providing that ordinances may be enacted restricting and segregating the location of industries and of various classes of buildings, and may divide the city into districts which the council may deem best suited to carry out the purposes of the act, the statute in section 2 thereof says: 'For each such district, regulations may be imposed designating the class of use that shall be excluded or subjected to special regulations and designating the uses for which buildings may not be erected or altered, or designating the class of use which only shall be permitted. Such regulations shall be designed to promote the public health, safety and general welfare. The council shall give reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the direction of building development in accord with a well-considered plan.' It is the contention of petitioners that the zoning ordinance in question in this case has utterly failed to give consideration to any of those things so far as the ordinance relates to petitioners' property and to the particular locality in which this property is situated. (1) We have reached the conclusion that this contention of petitioners must be sustained, even though it be assumed to be the law that the City of Los Angeles is vested with the power, by a properly constructed zoning ordinance, to deprive a citizen of the right to erect a storehouse upon his property in a residence portion of the city 'for the conduct of a lawful, inoffensive and harmless business.' We are of the opinion that even upon the assumption that in a proper case

such authority exists as a lawful exercise of the police power, in aid of an official plan of city development, nevertheless such power must be exercised in the manner very aptly stated in the zoning law to which we have referred (Stats. 1917, p. 1419), wherein it is required that in adopting an ordinance of this kind, the council 'shall give reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the direction of building development in accord with a well-considered plan.' (See, also, Abbey Land etc. Co. v. San Mateo, 167 Cal. 434, 437.) It need not be denied here that the ordinance is the result of deliberate and careful study by the city planning commission, and that in general it does provide for the direction of building development, and that in many respects that direction is in accord with a well-considered plan. But it is manifest that in the application of such plan to the particular area within which the property of petitioners is located, there has been a disregard of the character of that district and of its peculiar suitability for particular uses, and a failure to properly regard the conservation of property values. As we have seen, the findings of the referee show, among other things, that Wilshire Boulevard is a main artery extending through the western portion of the City of Los Angeles and beyond said city as far as the City of Santa Monica; that said boulevard is a main artery of automobile and vehicular traffic and is constantly filled with automobile trucks and other vehicles engaged in commerce between said communities; that said automobile traffic creates much noise, confusion and congestion along said boulevard where the property of petitioners is situated and for long distances in

either direction from said property; that there is not located along said boulevard within one mile in either direction from said property any dwelling-house or other structure or improvement permissible under 'B' zone, except that there is located on a lot on Wilshire boulevard near the property of petitioners 'an old farm house'; that such buildings as are located along said boulevard for a long distance each way from the property of petitioners are used for business purposes, and that all of said buildings, with one exception, were located on said property at the time said zoning ordinance went into effect. It is further a fact established by the findings that the property of petitioners would have a market value of from one hundred per cent to two hundred per cent greater than it now has if said property could be used for business purposes; that the property of the petitioners is as well adapted to business purposes and uses as is other property along La Brea street in the same vicinity, which property is by said ordinance zoned so as to permit the use thereof for business purposes.

"In the matter of the application of Throop, 169 Cal. 93, it appeared that the city of South Pasadena had adopted an ordinance dividing the city into three districts or zones, which were supposed to be, respectively, the retail business district, the industrial district and the residence district of the city. It was declared to be unlawful to erect or maintain certain kinds of business within the district characterized by the ordinance as the residence district. One of the excluded industries was that of a stone crusher. The petitioner was maintaining a stone crusher within that district. From the evidence it appeared that the only district in which a stone

crusher was permitted by the ordinance was situated in the heart of the city and surrounded by residences and other buildings on all sides; whereas the same ordinance made it a crime to erect or maintain a stone crusher in a remote corner of the 'residence district', containing more than two thousand acres, a greater part of which was sparsely settled, or to maintain or erect one in the center of an area containing five hundred acres in the residence district, which was admittedly unimproved, undeveloped and practically uninhabited. The Supreme Court held that an ordinance imposing such a restriction in a sparsely settled territory, while allowing its operation in a more densely inhabited territory, 'does not subserve the ends for which the police power exists'.

"*So here it appears from the facts to which we have referred, that the ordinance in question, in its application to the property of petitioners and the immediate territory within which that property is situated, is not an ordinance for the protection of an established residence district or for the benefit of the inhabitants thereof; but that on the contrary it is an arbitrary attempt of the city authorities to discriminate between the uses of property permitted in that territory and the uses of property permitted in other territory of a similar general description, and that the circumstances do not exhibit any sufficient reason for the exercise of a power to impose such discriminatory limitations.*" (Italics ours.)

With Respect to Our Contention That the Ordinances Are Unjust and Discriminatory, Imposing Unconscionable Burdens Upon Plaintiffs in Error, While Conferring Special Privileges Upon Other Owners of Property, We Beg Leave to Submit the Following:

First: From the findings of the referee we learn that Wilshire boulevard is intersected by a street known as La Brea avenue, which lies three blocks east of the property of plaintiffs in error. At the time of the adoption of the ordinance, and at the time of the filing of the complaint in this action, La Brea extended from Hollywood on the north to and across Wilshire boulevard and for a distance of two or three miles to the south thereof. North of Wilshire, La Brea was an improved street, but south of Wilshire it was improved only for a distance of two blocks, being thereafter a dedicated street without improvements and wholly impassable. North of Wilshire the property fronting on La Brea was almost entirely unimproved and undeveloped. South of Wilshire it was entirely unimproved and undeveloped. [R. p. 47.] Under the ordinances in question the property fronting upon La Brea, even in sections where, at the time, La Brea was a wholly impassable street, is zoned for business uses and purposes. We submit that an ordinance which gives such advantages to property upon an unimproved street in the immediate vicinity of plaintiffs' property, where there were no improvements whatsoever, and where the street itself was impassable, unjustly discriminates against the property of plaintiffs.

Second: The findings of the referee show that paralleling Wilshire boulevard, and approximately three-fourths of a mile to the south thereof, is another main artery of travel between the City of Los Angeles and the Pacific Ocean, known as Pico street. Eastward from Rimpau boulevard, Pico is a well developed business street. Westward from Rimpau to the city limits it is less devoted to business than Wilshire boulevard, there being fewer business houses and more residences fronting thereon than upon Wilshire. Like Wilshire, it is a traffic artery, but the vehicular traffic is not as heavy as upon Wilshire boulevard. [R. p. 51.]

Under the provisions of the zoning ordinance Pico street throughout is in Zone C, although that portion of it westward of Rimpau boulevard traverses the same general territory as Wilshire, is more of a residence street and less of a business street from the standpoint of actual development, and is better adapted to residences than Wilshire, by reason of more desirable traffic conditions.

Third: Again the record discloses that at various arbitrarily selected spots upon Wilshire boulevard the property has been zoned for business, although in no instance is the property thus favored any better adapted or fitted for business than the property of the plaintiffs in error. Examples of this are found in the zoning of the two blocks at La Brea for business, Western avenue in the older section of Wilshire where there is actually a residential development, and at Vermont, also within the older and well developed residential section of Wilshire.

The Supreme Court disposes of the contention that the zoning of La Brea was arbitrary and discriminatory by saying that it was but the carrying out of a harmonious plan for the City Council to zone La Brea avenue for business purposes since it was a main thoroughfare crossing Wilshire boulevard at right angles. [R. p. 66.] But there are many other streets in that section also crossing Wilshire boulevard at right angles, and it is not a main thoroughfare after passing Wilshire, for as we have heretofore pointed out, it was there found by the referee to be a wholly impassable street without improvements. [R. p. 47.] We submit that there is nothing harmonious, natural or logical about the selection of wholly unimproved property upon an unimproved, impassable street, as business property, while denying equal rights to property located as that of the plaintiffs in error. Furthermore, says the court, "there was thus provided at convenient and reasonable intervals adequate and convenient business districts to serve the needs of each particular neighborhood." We submit that the very reason given by the court is proof of the fact of discrimination. Such a plan must necessarily discriminate since it takes from the owner of one property the right to use it for business, while conferring monopolistic privileges upon other property without regard to anything except a blind choice made at intervals. If we understand correctly what the limitations of the police power are, with reference to zoning, or any other restriction upon the lawful use of property, they contemplate not merely the location of business districts pursuant to some plan of selection at places more or less equally distant from each other, but rather the establish-

ment and zoning of property in accordance with its inherent characteristics. To select property, and arbitrarily classify it as business property, without business improvements upon it, or near it; without means of access to it and without the immediate possibility of its fulfilling the destiny which the legislation creates for it, while denying an equal right to other property under any conceivable test far more eminently fitted, is, we submit, discrimination of the character which the law will not and should not tolerate.

With respect to Pico street the Supreme Court of California again shows its unfamiliarity with the facts by the statement that the findings o the referee show that Pico street is well adapted for business for the reason that it runs through a lower and less attractive territory than Wilshire boulevard, and is served by a double street car line. [R. p. 66.] *There is nothing in the findings of the referee to the effect that Pico street runs through a less attractive territory than Wilshire.* The finding is that it runs through a lower territory, which is the natural order of things in view of the fact that it is further removed from the mountains and nearer the ocean. But that it is less attractive territory is not the finding of the referee at all. On the contrary, to negative any such assumption it appears from the referee's findings *that there were more residences upon Pico than upon Wilshire from Rimpau street westward to the city limits, and fewer business houses,* indicating that if attractiveness of the territory was a matter for consideration, that property on Pico was more sought after for residential development than Wilshire. Again,

the Supreme Court of the State of California is in error in its statement that Pico street is served by a double street car line. This is true only easterly of Rimpau boulevard, and it is Pico street westward from Rimpau boulevard that is comparable with Wilshire in the vicinity of plaintiffs' property.

So we find the true facts to be that in every respect Wilshire Boulevard is in every regard as fitted and adapted for business as is Pico street throughout comparative sections, and in many respects far better adapted. While there are many homes upon Pico there are none upon Wilshire. Where there are business houses upon Wilshire there are fewer upon Pico. Westward from Rimpau neither has any advantage with respect to the street car transportation. Both serve the same general territory. Both are arteries for automobile travel, but traffic conditions on Pico are less favorable for business than upon Wilshire, while more favorable to residential development. What natural, logical and harmonious plan based on actual conditions actuated the City Council in conferring favors upon the owners of property upon Pico Boulevard, while denying the same favors to the owners of property upon Wilshire.

The Supreme Court of the state of California, despite these various and obvious instances of discrimination and unreasonableness in the operation of the provisions of this ordinance, seems to be able to inferentially find what the reasons were for the zoning of Wilshire Boulevard in the manner indicated. These reasons are arrived at by a process of faulty deduction and pure assumption, which, we submit, was wholly unnecessary and unwar-

ranted in view of the fact that the record discloses the true reasons which prompted the City Council in the zoning of Wilshire. The findings of the referee show that prior to the adoption of the ordinance placing the property of plaintiffs and others on Wilshire Boulevard in Zone B, the City Council of the City of Los Angeles first ordered the property on Wilshire between La Brea avenue and the westerly city limits to be placed in Zone C. [R. p. 50.] Thereafter and prior to the formal adoption of the ordinance, the secretary-consultant of the planning commission, a firm of landscape architects and the Community Development Association, a voluntary organization, interested themselves in the zoning of Wilshire. None of these people or organizations were property owners, but apparently had some interest, the nature of which is not divulged by the record. At any rate, it is quite obvious that their interest bore fruit for the City Council reconsidered its former action, decided that the property should not be used for business and ordered it placed in Zone B, and thereupon adopted the ordinance as it stands. [R. pp. 50 and 51.] Thereafter plaintiffs in error petitioned the City Council to adopt an ordinance placing the property of plaintiffs in error within Zone C. The matter was referred by the City Council to its public welfare committee, which later made a report which was unanimously adopted by the City Council. The report thus adopted is as follows:

"In the matter of the communication from A. E. Ross and Hector Zahn by Hill and Morgan, their attorneys, requesting a change of zone from B to C of the property located along Wilshire Boulevard somewhat west of the

intersection of La Brea avenue and Wilshire Boulevard, and easterly and westerly from Cochran avenue, formerly Cahuenga avenue, your committee desires to state that we believe Wilshire Boulevard is destined to become a show street when widened and beautified, as contemplated, and the encroachment of business upon this boulevard is at this time unnecessary, and would be a great detriment to the future residential development of this thoroughfare. And we therefore recommend that the request be denied and filed." [R. p. 48.]

So we see that at the time of the adoption of this ordinance there was on foot a movement (not by the property owners, nor those primarily affected or interested, but by an association, the nature and character and mission of which is undisclosed) to widen Wilshire Boulevard and to beautify it in some manner, and that the real reason for the zoning of Wilshire against business was in aid of its contemplated destiny *as a show street.* We find no mention of these circumstances in the opinion of the Supreme Court of the state of California, and in view of the effort which that court made to find reasons of a legal nature sustaining the action of the City Council in zoning this property, we submit that it is a matter of legitimate comment that the declared reasons of the City Council contained within the record were overlooked. We submit that these declared reasons in themselves render the ordinance invalid, for we have yet to find a well written decision by any court justifying the enactment of a zoning ordinance for reasons purely aesthetic. Even the most pronounced declarations of approval of zoning as a constitutional enactment under the

police power expressly decline to approve of aestheticism as the basis for the exercise thereof.

In Massachusetts, where the proponents of zoning find great solace in the decision of the Supreme Court of that state in the case of *In re Opinion of Justices*, 127 N. E. 525, the court expressly declared:

> "that aesthetic considerations alone, or as the main end, do not afford sufficient foundation for imposing limitations for the use of property under the police power. * * * The inhabitants of a city or town can not be compelled to give up rights in property or to pay taxes for purely aesthetic objects, but if the primary and substantive purpose of the legislation is such as justifies the act, considerations of taste and beauty may enter in as an auxiliary."

In New York, also relied upon by the advocates of zoning as a bulwark of judicial authority in support of zoning as a police power measure, the courts have been careful to denounce and reject zoning ordinances actuated by aesthetic motives. In the case of *Isenbarth v. Bartnett*, 206 App. Div. 546, 201 N. Y. S. 383, the court was called upon to determine whether or not a zoning ordinance purporting to restrict certain blocks for residential purposes only was valid. The facts were somewhat similar to the facts in the case at bar, in that there were other business houses in the vicinity of the petitioners' property, and it was shown, as here, that the value of the petitioners' property for residential purposes was less than it would have been had the property not been zoned at all, or zoned for business. Certain facts were also shown from which the court found that aesthetic considerations played a part in the enactment

of the ordinance. In holding the ordinance unreasonable and void the court stresses upon the vicious practice which seems to be in vogue, not only in California, but elsewhere, of depreciating the value of the property by zoning laws as an aid to schemes for the economical widening of streets. The decision is in part as follows:

> "The zoning commissioners wavered between the plain fact that the avenue had lost its residential character and the opposite fact that to zone the east side for business would detract from the vista of the entrance to the park. It was conceded that, in finally zoning for residences and so preserving this vista, they had taken into consideration the fact of the existing restrictive covenants as a circumstance of some importance; i .e., that, even if the east side was zoned for 'business', the covenants, if enforced, would prevent availing of such zoning permission. It is obvious, however, that the efficacy of a private restriction is quite a different matter from that of public zoning. The former is of no force, unless asserted by action of covenantees; and if the court found a material change in the nature of the neighborhood the private covenants might be denied enforcement."
>
> "There can be no doubt that this action was a yielding to the idea of preserving the vista of this private park by restricting petitioners' property to use which the development of the rest of the street and neighborhood had rendered obsolete. The Court of Appeals in People, *ex rel* Sheldon v. Board of Appeals, 234 N. Y. 484, 138 N. E. 416, has lately dealt with the factors which would justify zoning in a neighborhood as 'business.' These factors have been sacrificed to the purely aesthetic purpose of

preserving a vista to private property, which is a matter to be secured so far as it may by private covenant, without the backing of the police power. * * *

"It might add to the attractiveness of the city to preserve this private vista, but, if so, such would seem to be a matter to be governed by the eminent domain principle, with compensation to the owner, rather than the zoning practice, with loss to him. * * * It is not disputed that, as a business locality her place would be worth about $55,000 as against $15,000 to $21,000, its residential use value. In addition these different values reflect upon the amount of the probable award she may get in new widening proceedings for the avenue, now contemplated, for, if held to the residential use and value, the award would hardly equal what it would be for a business use and value."

The opportunities for abuse in the adoption of zoning ordinances are obvious and many, and we feel that the present cause presents many instances of this abuse. No effort has been made by respondents in error to show that public welfare has been in any wise protected or benefitted by the zoning of the property of plaintiffs in error against business, unless it be conceded that an intangible scheme for the beautification of Wilshire Boulevard and its establishment as a show street constitutes a sufficient reason for the taking and damaging of property without compensation and without due process of law. It may be that in time to come, if some projected movement for the widening of Wilshire Boulevard be initiated the zoning of this property against business will have the effect of reducing materially the compensation

received by the owners for the property taken. This was actually urged as a valid reason for zoning by counsel for defendants, and illustrates the dangers which lurk in paternalistic legislation of this character.

Unquestionably under the police power in a proper case, property may be restricted against uses which are in themselves offensive, or which are of such a character as to likely become so, either by reason of the intrinsic characteristics of the use itself, or by reason of the manner in which it is conducted. But the police power is a doctrine of protection and was never intended as a substitute for eminent domain, and was never intended to give to the state or any agency of the state the right to take or destroy or to limit the use of private property *purely for public use or benefit*. It has always seemed to us that the courts which have upheld zoning as a police power measure have failed to appreciate that the police power is a measure designed and intended only as a doctrine of protection in favor of the public against that which might inure to the detriment of its health, safety, morals or general welfare. But to extend this doctrine beyond this well defined line is to trench upon the constitutional provisions that private property shall not be taken or damaged for public use without compensation or without due process of law. To zone pursuant to any plan of developing either the occupied or the unoccupied portion of the city for the benefit (but not the protection) of any or all of the inhabitants thereof, if, as a result thereof, it accomplishes the destruction of property rights is a taking or damaging for public use and benefit, violative of the provisions of our constitution

if due process of law is not had in the taking and just compensation made therefor. If it was the purpose of the City Council of the City of Los Angeles to make of Wilshire Boulevard a highway beautiful under any conceivable scheme of beautification which the councilmanic mind might conjure in the interests of the general public for the purposes of general welfare, then any damages incident thereto should be paid for. But to destroy the right of the plaintiffs to use their property for the purposes for which it is adapted, for which it was subdivided, for which it was sold and paid for, for which plaintiffs desire to use it, for which the other owners of adjacent property desire to use their property, not in the interests of public safety, health or morals, nor in the protection of general welfare, but solely as a measure for public benefit precisely as would be the taking of property for the construction of a school, city hall or library, without the payment of compensation or due process of law, arbitrarily, unreasonably and pursuant to the dictates of landscape artists and paternalistically inclined planning experts, is an outrageous infringement upon the plain language and meaning of our constitution. The modern tendency is to undermine this document by indirection and stealthy encroachment, but as stated by Mr. Justice Holmes in the case of Pennsylvania Coal Co. v. Mahon *supra:*

> "The protection of private property in the fifth amendment presupposes that it is wanted for public use but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the 14th amendment. *When this seemingly absolute protection is found to*

be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change." (Italics ours.)

We find some difficulty in reconciling the decision of the Supreme Court of the state of California in the case of *Pacific Palisades Assn. v. City of Huntington Beach*, 69 Cal. Dec. (Adv. Sheets of Cal. Reps.) 583, decided about three months after the decision in the case at bar. There the court had under consideration the zoning laws of Huntington Beach, creating districts of a business character and of a residence character, and prohibiting in either the drilling and operation of oil wells. The property of plaintiffs was near a district largely unoccupied, the existing development being residential. There were producing oil wells within 500 feet of plaintiff's property. Lying just easterly of plaintiff's property was an established residence district, within which oil wells were permitted to be drilled, and this was true of other sections. The plaintiff had appealed to the Supreme Court, the decision of which is in part as follows:

"We are of the opinion that the appellant has stated the cause of action. The business of boring for and producing oil is a lawful enterprise. The effect of the ordinance absolutely prohibiting the maintenance and operation of oil wells within cer-

tain designated limits of the city of Huntington Beach is to deprive the owners of the property within such limits of a valuable right incident to their ownership. While the use to which one may put his property may be restricted or regulated by the state, in the exercise of its police power, so far as it may be necessary to protect others from injury, from such use, it is elementary that the enjoyment of the property cannot be interfered with or limited arbitrarily. It must be taken as very definite and settled in this state that the right to zone may be resorted to by municipalities upon a proper invocation of the police power. But such zoning must be reasonably necessary and reasonably related to the health, safety, morals or general welfare of the community. A municipality is not permitted under the guise of regulating business, and segregating it to a particular district, to granting a monopoly to business establishments and enterprises, already situated in unrestricted districts. The City of Huntington Beach has the unquestioned right to regulate the business of operating oil wells within its city limits, and to prohibit other operations within delineated areas and districts if reason appears for so doing. Ordinances having that effect must be reasonable and must be for the purpose of protecting the public health, comfort, safety or welfare."

We submit the foregoing is equally applicable to the case at bar. One of the errors, as we see it, indulged in by the Supreme Court of the state of California in the instant case was the practice of taking each item which we urged as evidence of the unreasonableness of the ordinance, and determining the question from the viewpoint of such separate item alone. If, for example,

the fact that plaintiffs' property had been originally subdivided and sold as business property, had been the only thing to consider, it might well have been that the Supreme Court could have said that other factors outweighed it and that alone it did not conclusively establish that the property was unadapted for the purposes for which it was zoned. But when added to this factor are the many others, it clearly establishes that they in their aggregate more than prove the unreasonable nature of the ordinance, and its unjust and unfair operation.

One of the vices inherent in this character of legislation is that it soon becomes the football of selfish interests inasmuch as its entire existence, scope and operation affects intimately the financial interests of thousands of people. All owners of property on streets zoned for business feel that business districts should be kept intact and not enlarged. Given their way, they would make the present zoning status perpetual, and when the number affected in this fashion includes the owners of property in the metropolitan business area and all of the large downtown business stores with their thousands of employees and their ability to make their needs felt in many quarters, as, for example, in the columns of the newspapers, it is to be expected that a few property owners seeking to break this monopoly would be defeated. Such a result is inevitable when the number of those financially interested in keeping business from Wilshire greatly outnumbers those interested in placing it there.

We contend the record proves conclusively that the Supreme Court of the state of California was in error

in assuming that the ordinances in question were reasonable in that plaintiffs' property and other property were adapted for residential uses.

III.

That Ordinance No. 46250 (N. S.) of the City of Los Angeles, Being the So-called "Set Back Ordinance" Is Not a Valid Exercise of the Police Power of the City of Los Angeles and Is in Violation of the Provisions of the Constitution of the United States and in Particular the 14th Amendment Thereof, in That the Provisions of Said Ordinance Constitute a Taking of the Property of the Plaintiffs in Error Without Due Process of Law and Further With Reference to the Property of Plaintiffs in Error Said Ordinance Is Unreasonable, Unjust and Discriminatory, Being Wholly Unnecessary for the Preservation of the Public Peace, Health, Morals, Comfort or Welfare of the People of the City of Los Angeles, or Any Portion Thereof.

Ordinance No. 46250 (N. S.) establishes a setback line on Wilshire Boulevard between Bronson avenue and the west city boundary of the City of Los Angeles, and requires that all buildings and structures on property having a frontage on Wilshire Boulevard between Bronson avenue and the west city boundary line, be set back a minimum distance of 15 feet from the street line of said boulevard. The property of plaintiffs in error is affected by this ordinance and if said ordinance be valid they cannot erect any structure upon their property within

15 feet of the street line. The Supreme Court of the state of California did not pass upon the validity of this ordinance, as a writ of mandate should not issue if the zoning ordinance was valid and the validity of the zoning ordinance was upheld. If the zoning ordinance, in its application to the property of plaintiffs in error be declared unconstitutional or unreasonable, then the question of the validity of the so-called setback ordinance must necessarily be determined, as plaintiffs in error, in their petition, prayed for a writ directing the defendants in error to issue them a building permit in accordance with the plans and specifications filed, which plans and specifications call for the construction of the building up to the street line of said Wilshire Boulevard and upon the property included in the 15 foot set back created by said Ordinance No. 46250. It will be noted that this ordinance purports to be an exercise of the police power and that no compensation is provided for or made for the property rights taken.

While the question of whether or not the City of Los Angeles is limited in the exercise of its power by the Building Line Act of 1917 adopted by the Legislature of the state of California, Stats. 1917, p. 1421 Deering's General Laws of California (1923), p. 371, is one which is not properly before this court, still we feel that the provisions of that act show clearly that the Legislature of the state of California deemed the exercise of a power to establish set back lines the exercise of the power of eminent domain and not an exercise of the police power. Section I of the act is as follows:

"Whenever public interest or convenience may require, the City Council of any municipality shall have full power and authority to provide a procedure for the fixing and establishing of set-back lines on private property bordering on the whole or part of any street, avenue or other highway, to prohibit the erection of buildings, fences or other structures between such set-back lines and the lines of any such street, avenue or other highway, and *to condemn any and all property necessary or convenient for that purpose.*" (Italics ours.)

Section II of the act provides the procedure for obtaining the property necessary or convenient under the power of eminent domain.

Under this ordinance the city deprives the owner of the property of all use of the 15 foot strip bordering upon the street and makes no compensation to him at all. The only thing that the owner could use this strip for would be for the purpose of planting lawns or shrubbery. It must be clear that this set-back ordinance is much more vicious than the zoning ordinance, in that it does not merely purport to limit, restrict, or prohibit in part the use of property, but absolutely prohibits any and all use of the property, except, perhaps, the creation of a semi-public park by the owner at his own expense for the city by planting lawns and shrubbery thereon. The property in every other respect stands devoted to public use and the owner is deprived of all rights over it other than the privilege of spending money to beautify it for the benefit of the public. The Legislature of the state of California, as heretofore noted, recognized these facts when it provided for proceedings in eminent domain whenever a municipality should deem

it necessary to enact such an ordinance. It cannot be pretended that it is necessary that buildings upon Wilshire Boulevard should be set back 15 feet in order to provide a sufficient amount of light and air, as Wilshire Boulevard is one hundred feet in width and is one of the widest streets in the city, and moreover, this ordinance does not make any provision whatever as to light or air between buildings. The ordinance, it will be noted, does not provide for set back lines throughout the entire city, but only establishes them on certain property on Wilshire Boulevard. On other and much more narrow streets, property owners are permitted to utilize their entire property up to the street line.

The real reason for the establishment of this set-back ordinance was admitted by counsel for defendants in error in their briefs before the Supreme Court of the state of California. There they urged that the City Council had the power to establish a set-back line so that streets and traffic arteries might be economically widened in the future. In other words, the position seems to be that though the Constitution prohibits the taking of property of the individual by the state for public use without compensation being first made therefor, still the state and its agencies may, by forbidding the use of property, decrease its value so that at the time the entire property is taken, compensation will not have to be made for the value which the property would otherwise have were it not for the restrictions placed upon it by ordinances of this character. It is plain that if the police power can be used for such a purpose, then there

is nothing in our Constitution which will protect private property.

The decisions of practically every court, where the question has been presented, are against the validity of the exercise of the police power in this manner. The cases may be classified in two groups. The first line of cases are those in which it is held that ordinances providing for the filing of a plan or map locating streets in the city, and denying compensation for buildings erected in any proposed street appearing upon the map after the filing of the map when the land is actually condemned, unconstitutionally deprive the owners of the property through which the proposed street runs, without due process of law, and amount to a taking of property without just compensation. Some of these cases are:

Moale v. Baltimore, 5 Md. 314;
Edwards v. Bruorton, 146 Mass. 529; 69 N. E. 328;
Forster v. Scott, 136 N. Y. 577; 32 N. E. 976;
Re New York, 200 N. Y. 536; 93 N. E. 498;
Re Saritoga Ave., 226 N. Y. 128; 123 N. E. 197;
Kiltinger v. Rossman (Dela. Ch.) 112 Atl. 388.

It will be noted that these cases involve the very power which was urged as the reason for sustaining this ordinance, that is, the restricting of the property as to use so that the city could later avoid the payment of the full compensation for the property when condemned, which would arise were the owners thereof permitted to use it as they desired. The very reason urged by the city, i. e., that by these set-back restrictions it can avoid the payment of compensation for buildings that might be

erected on the property, by prohibiting the erection of such buildings, is clearly within the rule of the cases cited above.

The other line of cases are those involving set-back lines of the character here involved. The decided weight of authority is against the validity of such set-back lines. One of the earlier cases was the case of *St. Louis v. Hill,* 116 Mo. 527; 22 S. W. 861. The ordinance involved provided for a set-back line of 40 feet along a boulevard in the City of St. Louis. In holding the ordinance unconstitutional, the court said:

> "The day before the ordinance went into operation defendant had the unquestionable right to build at will on his lot. The day afterward he was as effectually prevented from building on the 40 foot strip, except under peril of punishment, as if the city had built a wall around it, and this, too, without any form of notice, any species of judicial inquiry, or any tender of compensation. If this is not a 'taking' by mere arbitrary edict, it is difficult to express in words the meaning which should characterize the act of the city."

In the late case of *Haase v. City of Memphis,* 149 Tenn. 235; 259 S. W. 545, the court had before it the question of the constitutionality of a statute permitting the establishment of building lines by municipalities. The City of Memphis passed such an ordinance affecting the plaintiff's property and refused to give a permit for the construction of the building, unless it conformed to the building line so established. After holding that the statute required that compensation be made before the city had power to exercise authority over any of the property involved in the set-back ordinance, the court said:

> "We think any other construction of the ordinance or Act of 1921 would make them unconstitutional, for the only provision for compensation to the property owner is the reference in the statute to the general condemnation laws, which must be followed. The city is not entitled to deny the building permit to the plaintiff, unless it takes and pays for his property."

Another late case involving the constitutionality of setback or building lines is the case of *In re Opinion of the Justices*, 128 Atl. 181. In holding that building lines could not constitutionally be established without compensation, the Supreme Judicial Court of Maine said:

> "(e) Regulation of the Percentage of a Lot that May Be Occupied, the Size of Yards, Courts, and Other Open Spaces—Such regulation involves the establishment of building lines. The weight of authority seems to be that building lines cannot be justified under the police power (12 A. L. R. 681; 2 Dillon, Mun. Corp. (5th Ed.), §695; 1 Lewis, Em. Domain (2nd Ed.), §114-a), but must be accomplished by the exercise of the right of eminent domain with compensation; such by law of this state is the method for the establishment of parks. R. S., c. 4, §87."

The following cases follow the doctrines above enunciated:

People ex rel. Dilzer v. Calder, 89 App. Div. 503, 85 N. Y. S. 1015; *Byrne v. Maryland Realty Co.*, 129 Md. 202, L. R. A. 1917-A 1216, 98 Atl. 547; *Willison v. Cooke*, 54 Colo. 320, 130 Pac. 320; *Romar Realty Co. v. Haddonfield*, 96 N. J. Law 117, 114 Atl. 248; *Wyeth v.*

Whitman, 72 Fla. 40, 72 So. 472; *Hecht Dann Construction Co. Inc. v. Burden*, 124 Misc. 632, 208 N. Y. S. 299; *Heller v. Village of South Orange* (N. J.), 130 Atl. 534; *Eaton v. Village of South Orange* (N. J.), 130 Atl. 362; *Scola v. Senior*, 130 Atl. 886; *Fruth v. Board of Affairs*, 75 W. Va. 456, 84 S. E. 105.

A somewhat similar question was involved in the case of *State v. Edgecomb*, 189 N. W. 617, where the Supreme Court of Nebraska had before it the question of whether or not an ordinance limiting the area upon which a building could be constructed on certain property to twenty-five per cent thereof was constitutional. In holding that the ordinance was unreasonable, the court said:

> "Police power is that undefined branch of government which bears the same relation to a municipality that the principle of self-defense bears to the individual. *Barrett v. Rickard*, 85 Neb. 769, 124 N. W. 153. 'Police power is founded upon public necessity and only public necessity can justify its exercise'. Spann v. City of Dallas (Tex. Sup.), 235 S. W. 513, citing Cooley, Constitutional Limitations (5th Ed.), page 248."

Two cases only in the entire nation would seem to justify setback ordinances of the character here involved under the police power. The most cited case is that of *Town of Windsor v. Whitney*, 94 Conn. 357, 111 Atl. 354, 12 A. L. R. 669. While the court in that case uses language which would indicate that it would sustain a setback ordinance under the police power, the precise question involved was whether a city could require as a condition precedent to the acceptance of a plat or map

of a new subdivision, that the streets therein conform to the city map and that building lines be established which would conform to the building lines on adjacent property, and the court held that such a requirement was valid. The city, of course, is not required to accept, as dedicated streets, new streets in a subdivision unless they conform to such requirements as the City Council sees fit to impose, nor need the city give its approval of a proposed plat or map of a subdivision unless the conditions fixed by it are met and complied with. A dissenting opinion was filed in the *Town of Windsor case, supra,* which, to our minds, enunciates clearly the constitutional limitations upon the power of a city.

Another case which seems to sustain the validity of such an ordinance is the case of *City of Bismarck v. Hughes,* 208 N. W. 711 (Adv. Sheets), decided by the Supreme Court of North Dakota. No cases are cited as sustaining setback ordinances, but the court simply says that it sees no reason why an owner of property should not be willing to conform to the building line so that his building will conform to that of his neighbors as to its location.

The ordinance is one clearly enacted for aesthetic purposes alone and considerations of public health, safety, morals or general welfare are not involved in any degree whatsoever. Either that, or the ordinance was enacted for the purpose of depreciating the value of the property involved so that the city could evade in subsequent condemnation proceedings, the requirement of the constitutions both of the state of California and of the United States, of making just compen-

sation for the property. Whether the purpose be one or the other, the ordinance clearly deprives the owner of his property without due process of law.

As we have heretofore stated, the Supreme Court of the State of California found it unnecessary to pass upon this precise question in view of its prior finding that the zoning in the manner complained of was reasonable and constitutional. However, in the decision of the District Court of Appeal it was expressly held that the so-called setback ordinance was unconstitutional.

Inasmuch as the opinion of the District Court of Appeal is probably not available to the court, we take the liberty of quoting in full the language relative to this question, as we feel that the reasoning of the court is a splendid argument in our behalf:

> "We are further of the opinion that the so-called setback ordinance is an unlawful attempt by the city to exercise the police power in the limitation of the use of their property by the petitioners. It is not an ordinance having any of the characteristics of an ordinance for protection from fire or from other dangers which might arise from any condition pertaining to a proposed use of property. It does not attempt to prescribe a distance which must be maintained between buildings on the same side of the street. Wilshire boulevard is a street one hundred feet in width. It is manifest that the purpose of requiring buildings to be set back fifteen feet from the street line of such a street has no relation to danger from fire, or other dangers which might exist as between properties facing each other on opposite sides of the street. While the city bases its claim of right to enforce the setback ordinance, not upon

the authority of a statute but upon the police power delegated to the city by the Constitution, it is worthy of note that there is a statute adopted in the year 1917 (Stats. 1917, p. 1421), which purports to give authority to the city council of any municipality to provide a procedure for the fixing and establishing of setback lines on private property bordering upon a street, 'and to condemn any and all property necessary or convenient for that purpose.' It is admitted by counsel for respondents that they have been able to discover only one authority sanctioning the right under the police power to create setback lines. That is the case of *Town of Windsor v. Whitney*, 95 Conn. 357, 111 Atl. 354, 12 A. R. L. 669. There a commission had been appointed by the town of Windsor under a legislative act concerning a commission on town plan. Pursuant to proceedings of that commission, a town plan had been established, which included a setback line at six feet from the street line. The property owners, defendants in the action, claimed that the enforcement of this regulation against them was not a legitimate exercise of the police power, and that the statute authorizing said acts of the commission was void. The court sustained the validity of the act, but specially noted that it was not concerned with the question of reasonableness or with the question of regulation under uniform rule of action. The court took into consideration the fact that the width of the street would have some bearing upon the question of reasonableness of a setback ordinance. 'Narrow streets in congested industrial centers breed disease. Too many houses crowded upon a lot without sufficient space for light and air menace health. Such a neighborhood affects the morals of its people. The sordid selfishness which would insist upon making

the street a mere alley, upon getting houses upon land without regard to reasonable provision for air and light, must be restrained if the public welfare is to be preserved. The state is vitally interested in the health of its citizens, for upon their strength rests its own well-being. It or its agent, the town, must provide fire and police protection to all settled parts. * * * If the prohibition of the act deprived an owner of the use of any part of his land, and this was not needed for the public health, or safety, or welfare, there would be a plain violation of the constitutional provision. But where it is so needed—and that is the case before us—the subjection to the police power of all property gives the state the right to forbid the use of property in the way desired, save under reasonable conditions, promoting the public welfare.' In a dissenting opinion in that same case, Justice Gager dissented from the view that such a restriction as was presented in that case, is an exercise of the police power, and not of the power of eminent domain. 'That such designation of a building line comes under the eminent domain power has hitherto been assumed by the legislature of this state to be unquestioned law, and all its legislation has been based on that assumption. Indeed, in the opinion in this case, it is admitted that such is the law generally, and that as a rule municipal charters have provided for compensation.'

"The following cases are cited by petitioners herein as tending to support their contention that the setback ordinance here in question is invalid: *Wyeth v. Whitman* (Fla.), 72 So. Rep. 472; *Fruth v. Board of Affairs* (W. Va.), 84 S. E. 105; *City of Buffalo v. Kellner,* N. Y. Supreme Court, 153 N. Y. S. 472; *City of St. Louis v. Handlan* (Mo.), 145 S. W. 421. Without here discussing these cases,

we are content to say that as applied to the property of petitioners herein, the ordinance now in question is nothing more than an attempt to regulate and control the use of private property, such regulation being based on merely aesthetic grounds, and having no reasonable reference to the safety, health, morals or general welfare of the people at large. In announcing this conclusion, we do not intend to express the opinion that setback ordinances are under any and all circumstances unauthorized by the police power, or that they may not be enacted and enforced in accordance with the principles which apply to the exercise of the power of eminent domain."

Conclusion.

In conclusion we respectfully submit that these ordinances offend the letter of the Constitution of the United States and its spirit, and are repugnant to the conceptions of liberty and freedom and right which actuated our forefathers in the framing of it.

The proponents of zoning offer but flimsy pretexts for its justification under the police power and do not seem to appreciate the danger that will follow their efforts, if successful, in having the police power extended to cover and include all that may be found desirable by the public at large or any portion of that public, no matter how transitory or whimsical their fancy may be. *They urge the desirability of the results to be attained instead of the constitutionality of the methods employed.*

We wish to sound a warning that if this court upholds zoning as a police power measure it will be called upon

to extend this doctrine to other and even more dangerous legislative enactments destructive of private rights; and the door thus opened cannot be closed if consistent reasoning is adhered to. If municipal legislators may zone property irrespective of necessity and despite the inoffensiveness of is use by the owner, they mu[illegible] with equal justice and logical reasoning be allowed to regulate the architecture, the color scheme, the landscaping and all other features that may attend the possible uses of property. If the social and civic values of a city are sufficient to justify the restricting of property against inoffensive uses, they are sufficient to justify the opening of streets, the establishment of parks, hospitals, jails, city halls, libraries and playgrounds, and to properly require the owners to deliver up their property without compensation therefor. It may be that all these are proper measures conducive to the happiness and best interests of the American people, but if so, let us honestly admit that our forefathers were wrong, that our organic law with its declaration of rights is defective, that the right of private property is but a myth, and amend our Constitution. But these objects should not be attained by a process of strained judicial interpretation necessarily involving a distortion of its plain language, the result of which obviously must be to enlarge the police power to a point where the law of eminent domain becomes a mere figment of speech, and the payment of compensation, and the pursuit of due process of law, a mere nullity.

We invite a close inspection of every case decided by every court upholding zoning under the police power, and most respectfully suggest that these decisions

throughout savor most decidedly of an apology for a ruling based on expediency. Especially is this noticeable when they are contrasted with the sound, the logical and the judicial reasoning of those cases which uphold the constitutional principles involved in these cases.

Obviously these courts, believing that a demand existed on the part of the public generally for legislation of this character, have yielded to the pressure. The reasons given do not legally justify zoning as a police power measure and are but mere excuses apologetically given for manifest circumvention of the provisions of our Constitution.

Too often are local legislators wholly indifferent to matters of constitutional right or wrong, and the courts should refuse to be made the victims of legislative cowardice or cunning when these bodies, in response to political pressure, enact unconstitutional legislation with the deliberate purpose of passing on to the courts the onus of protecting the property rights of the individual.

We further submit that the ordinances in question are unreasonable and discriminatory with respect to petitioner's property. How, may we ask, may ordinances, the consequence and effect of which are to absolutely destroy any conceivable practical use to which the property may be put, be otherwise?

The real questions in this case are simple, both in application and in answer:

Does the Fourteenth Amendment mean what it says when its forbids any state to deprive any person of his property without due process of law?

Is it due process of law to prohibit a person the lawful and harmless use of his property merely that some other person or group of persons may derive added benefit from other property?

May one man's property be limited in lawful and harmless use, to his great injury, that another's property may be advantaged?

May a community in effect take property, by forbidding its lawful and advantageous use, without paying compensation?

May a city by lawful ordinance actually forbid the use of property in order that, pursuant to such forbiddance, such property may thereafter be acquired under eminent domain at a reduced valuation?

Is ours a government by rescript, a government by favor, a government of men or a government of law?

We submit that a just answer to these questions, in the light and under the limitations of the Fourteenth Amendment, requires that the judgment of the Supreme Court of the state of California be reversed.

Respectfully submitted,

HILL, MORGAN & BLEDSOE,
By A. J. HILL,
Attorneys for Plaintiffs in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1926.

No. 196.

Hector N. Zahn and A. W. Ross,
Plaintiffs in Error,
vs.
Board of Public Works of the City of Los Angeles, Charles H. Treat, Hugh McGuire and E. J. Delorey, etc.,
Defendants in Error.

ANSWER TO MOTION TO ADVANCE CAUSE ON CALENDAR.

JESS E. STEPHENS,
City Attorney, and
LUCIUS P. GREEN,
Assistant City Attorney,
Attorneys for Defendants in Error.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1926.

No. 196.

Hector N. Zahn and A. W. Ross,
Plaintiffs in Error,
vs.
Board of Public Works of the City of Los Angeles, Charles H. Treat, Hugh McGuire and E. J. Delorey, etc.,
Defendants in Error.

ANSWER TO MOTION TO ADVANCE CAUSE ON CALENDAR.

The plaintiffs in error in the above entitled cause have served and filed a notice of motion, accompanied by a printed motion, to advance said cause from its present position on the court's docket to the position now occupied thereon by the case of Village of Euclid, Ohio, *et al.*, appellants, vs. The Ambler Realty Company, appellees. The reason assigned for such application is that the two cases involve precisely the same questions of

law and it would therefore advantage the court to hear them contemporaneously.

With due deference to counsel we dispute the statement contained in their motion that the two causes involve precisely the same questions of law, or that their issues are identical.

Stripped to the bare constitutional questions raised by both cases, we concede the existence of a certain analogy between them, but taken as they must be with their attendant facts, this analogy at once disappears and they become as dissimilar in their legal aspect as they are in their physical. The constitutionality or unconstitutionality of these regulatory measures being wholly dependent upon the facts involved in each case, and the facts in the one differing in a marked degree from the facts in the other, not only in their physical characteristics but in the reasonableness of the regulations imposed, the issues of law therein involved must of necessity occupy the same degree of disparity.

It will therefore be seen that the court would derive no benefit nor advantage from a simultaneous hearing of the two causes, and on the other hand for the reasons hereinafter set forth the defendants in error and their undersigned counsel would be greatly inconvenienced and disadvantaged thereby.

The said motion is opposed on the further ground that the Ohio case was heretofore, on January 27th last, argued before this court, and by the court taken under advisement and assigned for further argument to October 11, 1926. Even if the questions involved were the same, it would be impossible to argue the two cases as

one (as required by subdivision 8 of Rule 26, Rules of the United States Supreme Court) for the reason that the argument in the Ohio case has already been partially completed, and in addition defendants in error would be placed in the disadvantageous position of meeting an argument partially concluded in their absence.

The court's attention is also respectfully invited to the fact that another cause, arising from the same jurisdiction and dealing with another phase of the zoning power, is now pending before it. This is the case of George Lee Miller, *et al.*, plaintiffs in error, vs. Board of Public Works of The City of Los Angeles, *et al.*, etc., No. 31473. The latter case is No. 219 on the October, 1926 docket, only twenty-two numbers removed from and subsequent to the position on the docket now occupied by this case. The inconvenience not only to counsel for defendants in error, but to the court which would result from a granting of the motion, leaving the Miller case in its present position to be subsequently disposed of, is quite obvious.

Subdivision 7 of Rule 26, Rules of the United States Supreme Court, provides that no other case, except criminal cases, cases once adjudicated by the court upon the merits and again brought up by writ of error or appeal, revenue and other cases in which the United States are concerned, will be taken up out of the order on the docket or be set down for any particular day except under special and peculiar circumstances to be shown to the court.

We respectfully submit that no special or peculiar circumstances warranting a disregard of the provisions of this rule have been shown to the court.

Depending upon the infallibility of the foregoing rule, and having no intimation of counsels' intended application for advancement of this cause until the service of the notice of motion, no attempt has been made to prepare either the brief or the oral argument in this cause. At this late hour and by reason of this circumstance, and the further fact that undersigned counsel are overburdened with other matters requiring their urgent attention, the granting of the motion would work extreme hardship upon them and would entirely preclude them from properly, or at all, presenting this cause to the court.

For the foregoing reasons we respectfully request that the motion of plaintiffs in error to advance said cause upon the calendar, be denied.

Submitted with deference, this.....day of September, 1926.

JESS E. STEPHENS,
City Attorney, and
LUCIUS P. GREEN,
Assistant City Attorney,
Attorneys for Defendants in Error.

TOPICAL INDEX.

TABLE OF CASES.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, 1926.

No. 196.

Hector N. Zahn and A. W. Ross,
Plaintiffs in Error,
vs.
Board of Public Works of the City of Los Angeles, a Municipal Corporation; Charles H. Treat, Hugh J. McGuire, and E. J. Delorey, Members thereof,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

The decision of the Supreme Court of the state of California, from which a writ of error to this Honorable Court has been sued out, may be found officially reported in 195 California Reports, page 497. The related case of *Miller v. Board of Public Works,* referred to in the record, appears at page 477 of said volume.

The proceeding was instituted August 7, 1923, by filing a petition for a writ of mandate [R. 1] directly with the Supreme Court of California, which court thereupon

issued an alternative writ of *mandamus,* in the exercise of its original jurisdiction, but made the writ returnable to the District Court of Appeal of California, Second Appellate District, to which court the entire proceeding was transferred.

The purpose of the mandate was to compel defendants to issue to plaintiffs a building permit to construct a business building upon a lot restricted against such use by a zoning ordinance of the city of Los Angeles, and place the same in closer proximity to the front line of the lot than permitted by an existing setback ordinance, the unconstitutionality and unreasonableness of the ordinances in each case being asserted.

An answer was filed October 10, 1923 [R. 28] on behalf of the defendants, which constituted their return to the writ; and issues of fact, in addition to issues of law, being thereby presented, the said District Court of Appeal made its order appointing a referee, who proceeded to sit and take evidence, after which his findings as such referee were filed with said court on October 29, 1923. [R. 42.] Upon these findings and the arguments of counsel, the matter was heard by said court and judgment rendered. This judgment was in favor of plaintiffs in error, but on May 19, 1924, following the filing of a petition, the Supreme Court of California made and entered an order setting aside said judgment and transferring the cause for hearing before said Supreme Court. [R. 53-54.] The entire proceeding was there reargued, additional briefs being filed, and thereafter the said Supreme Court rendered its decision in favor of defendants, sustaining the constitutionality of the

zoning ordinance in question and refusing to issue the writ petitioned for. From this decision the writ of error to this Honorable Court is sued out.

The zoning ordinance referred to is officially numbered 42666 (New Series). This is a comprehensive zoning ordinance which was enacted October 19, 1921, and has since been effective throughout the city of Los Angeles. Ordinance No. 44668 (New Series) is an amendment of the first mentioned ordinance, enacted September 21, 1922, and effective as to an area annexed to the city of Los Angeles February 28, 1922. The property of plaintiffs in error is located within this newly annexed area. [R. 45.]

Ordinance No. 46250 (New Series) established a setback line effective as to property along Wilshire boulevard between Bronson avenue and the west city boundary of the city of Los Angeles, and included the particular property of plaintiffs in error.

The writ of error to this court assigns as error each and all of the conclusions of the said Supreme Court, both as to the constitutionality of the said zoning ordinance and its reasonableness in its application to the particular property of plaintiffs in error. No decision was made by said court respecting the constitutionality or reasonableness of Ordinance No. 46250 (New Series), the so-called Setback Ordinance; nevertheless, error is likewise assigned as to this.

The attack is thus of a two-fold nature and adopts the form frequently followed by those who seek to repel the imposition by constituted authority of needful and necessary regulations under the police power.

The issue as to the constitutionality of the zoning ordinance is more purely one of law. The issue respecting the reasonableness of the said ordinance in its application to the property of plaintiffs in error, though of necessity involving considerations of fact, may be said likewise to partake of an issue of law; for we take it that in order that the position of plaintiffs in error in this behalf may be sustained, it must appear that under all the facts and surrounding circumstances as disclosed by the record and all other additional matters which the legislative body in the exercise of its discretion was authorized to consider and which it must be presumed it did consider, the ordinance as applied to this property had no real or substantial relationship to the public health, safety or morals, or to the general welfare, and that the action of the legislative body could not upon any basis be justified, and that accordingly such body exceeded its jurisdiction.

It will be our purpose to confine the argument, first, to the issue respecting the constitutionality of the zoning ordinance; and, second, to the reasonableness of its application to the property of plaintiffs in error.

As to Ordinance No. 46250 (New Series), the setback ordinance, we will take the position, supported by abundant authority hereinafter cited, that because the Supreme Court of California, for reasons appearing in its decision, avoided any decision as to the constitutionality of this ordinance, no error can be assigned which would give this court jurisdiction to entertain this matter.

To avoid possible confusion, we defer reference to the summary of facts and other matters pertaining to the question of the reasonableness of the ordinance until

after the presentation of the argument relating to the question of constitutionality.

Additional Facts in Relation to the Comprehensive Zoning Ordinance of the City of Los Angeles.

Plaintiffs in error present an incomplete summary of facts relating to said Zoning Ordinance No. 42666 (New Series), the comprehensive zoning ordinance of the city of Los Angeles. We deem it essential for a proper consideration of the question of the validity of the said zoning ordinance, and for a better understanding of the argument, that the court be more fully advised of its general nature and plan. In this some reference is made to the facts appearing in the record as recited in the decision of the state Supreme Court.

The said Zoning Ordinance of the city of Los Angeles represents a type of present-day comprehensive zoning which in recent years has been widely adopted and has been the subject of much litigation, as indicated by adjudicated cases of courts of various states and more recently of this court.

The regulations of this ordinance are almost exclusively use regulations. [R. Side folio pp. 1-38.] It does not include, as many such ordinances do, height limit or area restrictions. In this respect it differs from the ordinance involved in the recent case of *Village of Euclid v. Ambler Realty Company* (reported in U. S. Supreme Court Advance Opinions, 71 L. Ed. 171), and may be said to be less restrictive in its imposition of regulations. Practically the entire area of the city's sphere of activities is subjected to its regulations, effective in zones designated by the Council. Its general nature is indicated by its title, which reads as follows:

"An ordinance providing for the creation in the city of Los Angeles of five (5) zones, consisting of various districts, and prescribing the classes of buildings, structures and improvements in said several zones and the use thereof; defining the terms used herein, prescribing the penalty for the violation of the provisions hereof, and repealing certain ordinances."

It does not, as counsel inaccurately state, divide the city into five zones (Ptffs. brief, p. 11), but, rather, it divides the uses to which property may be put into five classifications. An examination of the ordinance clearly indicates that the classifications adopted are based upon conforming and related uses. In its administration a great many different zones are actually created throughout the city. The legislative body of the city, as a legislative function, determines the extent and boundaries of such zones and the nature of the permissive uses conforming with the classification that shall maintain therein.

The five zones are designated respectively as Zones "A", "B", "C", "D", and "E". This indicates the classification of uses above referred to, rather than any particular zone area.

It is provided in Zone "A" that:

"No building, structure or improvement shall be erected, constructed, established, altered or enlarged which is designed, arranged or intended to be occupied or used for any purpose other than a single family dwelling, together with the usual accessories located on the same lot or parcel of land, including a private garage containing space for not more than four automobiles, provided that only one such single family dwelling house shall be erected, constructed,

established, altered or enlarged upon any one lot or parcel of land, which said lot or parcel of land shall be not less than forty feet in width."

It is provided in Zone "B" that:

"No building, structure or improvement shall be erected, constructed, established, altered or enlarged which is designed, arranged or intended to be occupied or used for any purpose other than dwellings, tenements, hotels, lodging or boarding houses, churches, private clubs, public or semi-public institutions of an educational, philanthropic or eleemosynary nature, railroad passenger station and the usual accessories located on the same lot or parcel of land with any of said buildings, including the office of a physician, dentist or other person authorized by law to practice medicine and including private garages containing necessary and convenient space for automobiles."

It is provided in Zone "C" that:

"No building, structure or improvement shall be erected, constructed, established, altered or enlarged which is designed, arranged or intended to be occupied or used for any purpose other than a store or shop for the conduct of a wholesale or retail business, a place of amusement, an office or offices, studios, conservatories, dancing academies, carpenter shop, cleaning and dyeing works, painting, paper hanging and decorating store, dressmaker, laundry, millinery store, photograph gallery, plumbing shop, furniture storage, roofing or plastering establishments, tailor, tinsmith, undertaker, hospitals and sanitariums, upholsterer, dog hospitals, cat hospitals, commercial garages, and other similar enterprises or institutions; or for any purpose permitted by this ordinance in the 'A' zone or 'B' zone."

In Zone "D" it is provided by the ordinance that:

> "No building, structure or improvement shall be erected, constructed, established, altered or enlarged which is designed, arranged or intended to be occupied or used for any of the following specified trades, industries or purposes:"

(Here follows the designation of various so-called nuisance businesses, such as chlorine or bleaching powder manufacture, glue factories, etc.)

Zone "E" is the so-called unrestricted zone wherein property may be used for any lawful purpose. [R. Side folio p. 37.]

Said zoning ordinance was adopted by the City Council on the 18th day of October, 1921.

The record further discloses that there is in the city of Los Angeles, provided for by its charter, a department of the city known as the City Planning Commission; that the said Commission was created in 1920; that immediately upon its creation and prior to the adoption of the said general zoning ordinance, said City Planning Commission undertook a study of the city of Los Angeles, district by district, for the purpose of enacting a comprehensive zoning ordinance; that proposed zoning maps were posted and public hearings held; that thereafter each of said maps was considered by said City Planning Commission and presented to the City Counsel with the recommendation of said Commission; that thereafter the Council, in the exercise of its legislative functions, considered said recommendations and maps and enacted an ordinance zoning said city of Los Angeles, which is said Ordinance No. 42666 (New Series); that zoning maps

covering the area within which is located the property of plaintiffs in error in this proceeding were in like manner prepared and presented to the Council, with recommendations by the said Planning Commission [R. 53]; that at the time of the adoption of Ordinance No. 42666 (New Series), the property affected by amendatory Ordinance No. 44668 (New Series) was outside of the city of Los Angeles, but on February 28, 1922, by proceedings duly had, said tract was annexed to the city of Los Angeles [R. 45]; that said amendatory ordinance was adopted September 21, 1922; that by said amendment a considerable area lying along Wilshire boulevard, and including the property of plaintiffs in error, was placed in Zone B. By the same amendment the Council placed a certain region lying along La Brea avenue, an intersecting street, within Zone "C," the intersecting property facing on Wilshire boulevard being included in said Zone "C." [R. 45.]

Ordinance No. 46250 (New Series) is an ordinance establishing a setback line along Wilshire boulevard. In connection with this ordinance there are no particular facts to be recited, but, for reasons which are hereafter made to appear, we voice the opinion that no error may be assigned in this proceeding in respect to said ordinance.

Argument.

Each of the several ordinances attacked was admittedly enacted pursuant to the police power.

As to Ordinance No. 42666 (New Series) and the amendment thereof, Ordinance No. 44668 (New Series), the sole issue is whether the Supreme Court of California was in error in holding that said ordinances were a valid

exercise of the police power and that they did not transcend the limits within which the proper exercise of the police power must be confined, and that neither was violative of the Federal Constitution or the guarantees therein contained. As to amendatory Ordinance No. 44668 (New Series), a further question is presented as to whether said court was in error in determining that this ordinance was reasonable in its application to the property of plaintiffs in error and not discriminatory.

In addition to asserting that the conclusions of the Supreme Court of California upon these issues were error, opposing counsel also claim error in respect to Ordinance No. 46250 (New Series), the so-called Setback Ordinance, the error assigned consisting not in any conclusion of constitutionality by the said Supreme Court of California, but, to quote the language of counsel:

"That the Supreme Court of the state of California erred in not holding and declaring that Ordinance No. 46250 (New Series) of said city of Los Angeles, providing for the establishment of a setback line on Wilshire boulevard between Bronson avenue and the west city boundary of the city of Los Angeles * * * was unconstitutional and void and violative of the provisions of the Fourteenth Amendment to the Constitution of the United States." (Ptffs. brief, p. 17.)

In respect to this last mentioned ordinance the said Supreme Court stated:

"In view of the conclusion which we ultimately reach concerning the validity of the ordinance prohibiting the petitioner from building a business building in the zone in question, it will not be necessary for us to decide at this time the question as to whether or not the particular setback ordinance in question here is valid." [R. 56.]

Because of the fact that no conclusion was arrived at by the state court sustaining the validity of the said ordinance, we respectfully submit that no error can be assigned as to this, and that this court has not the jurisdiction to entertain this as an issue before it.

Section 237 of the Judicial Code (36 Stats. at Large 1156) clearly states the conditions authorizing the suing out of a writ of error. It seems almost academic to recite the provisions of that section, which provide that no writ of error may be sued out except as to a final judgment or decree in a suit in the highest court of a state in which a decision in the suit could be had and wherein is drawn in question the validity of a statute or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity.

The Supreme Court of California, in refraining from deciding the constitutionality of said Ordinance No. 46250 (New Series), clearly did not consider or pass upon any Federal question in respect to any issue of unconstitutionality presented by the pleadings as to its enactment; hence there was no decision in favor of its validity as required by said section 237, and error could not properly be assigned in this proceeding.

We briefly cite to the court the following authorities which we believe effectually dispose of this point, preliminary to the presentation of the argument relative to the constitutionality of the said zoning ordinances.

In the case of *California Powder Works v. Davis*, 151 U. S. 389, 393, the court, through Fuller, C. J., said:

> "It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision in the suit could be had, it must appear affirmatively not only that a Federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, *and that it was actually decided or that the judgment as rendered could not have been given without deciding it.*" (Itals. ours.)

Under this statute the Federal Supreme Court does not act as a general court of review, but its jurisdiction is limited by said statute. As has been stated by this court:

> "The Federal Supreme Court can take jurisdiction under this clause only where the decision of the state court is in favor of the validity of the statute of or the authority exercised under the statute drawn in question."

Citing:

> "M'Kinney v. Carroll, 12 Pet. 66, 9 U. S. (L. Ed.) 1002;
>
> Commonwealth Bank v. Griffith, 14 Pet. 56, 10 U. S. (L. Ed.) 352;
>
> Walker v. Taylor, 5 How. 64, 12 U. S. (L. Ed.) 52."

Again, it was said by this court in *Murdock v. Memphis,* 20 Wall. 590, 22 U. S. (L. Ed.) 429, speaking through Miller, J.:

> "We hold the following propositions on this subject as flowing from the statute as it now stands.

"That it is essential to the jurisdiction of this court over the judgment of a state court, that it shall appear that one of the questions mentioned in the act must have been raised and presented to the state court.

"That it must have been decided by the state court, or that its decision was necessary to the judgment or decree rendered in the case.

"That the decision must have been against the right claimed or asserted by plaintiff in error under the Constitution, treaties, laws or authority of the United States.

"These things appearing, this court has jurisdiction and must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the state court."

In the case of *Seaboard Air Line Ry. v. Duvall*, 225 U. S. 477, 487, it was said:

"It was the obvious duty of counsel, if they wished any particular construction of the act, to put the request in such definite terms as that the attention of the court might be directed to the point, and the record here should show that the right now claimed was the right 'specially set up' and denied by the court. 'It must appear on the face of the record that it was in fact raised; that the judicial mind of the court was exercised upon it; and then a decision against the right claimed under it.' Or, at all events, it must appear from the record that there was necessarily present a definite issue as to the correct construction of the act, so directly involved that the court could not have given the judgment it did without deciding the question against the contention of the plaintiff in error."

Citing:

"Maxwell v. Newbold, 18 How. 511, 515;
Sayward v. Denny, 158 U. S. 180;
Gillis v. Stinchfield, 159 U. S. 658;
Speed v. McCarthy, 181 U. S. 269, 275, 276;
Gaar, Scott Co. v. Shannon, 223 U. S. 468;
Appleby v. Buffalo, 221 U. S. 524, 529."

Further construing said statute (Sec. 709 Rev. Stat.) the court, in the above case, stated:

> "This case does not come here from a Federal court and we are, therefore, not a court of general review. It comes under Sec. 709, Rev. Stat., and the power to review a judgment of a state court is limited and defined by that provision. The sole ground upon which our jurisdiction is invoked is found in the third clause of the section, which provides that, 'when any title, right, privilege or immunity is claimed under the Constitution, or any treaty or statute * * * and the decision is against the title, right, privilege or immunity specially set up or claimed, * * * may be re-examined or reviewed * * *'" (pp. 485-86).

In *Appleby v. Buffalo*, 221 U. S. 524, 529, the court said:

> "This court has had frequent occasion to say that its right to review the judgment of the highest court of a state is specifically limited by the provisions of Sec. 709 of the Revised Statutes of the United States. This right of review in cases such as the one at bar depends upon an alleged denial of some right, privilege or immunity specially set up and claimed under the Constitution, or authority of the United States, which it is alleged has been denied by the judgment of the state court. In such cases

> it is thoroughly well settled that the record of the state court must disclose that the right so set up and claimed was expressly denied, or that such was the necessary effect, in law, of the judgment."

Citing:

> "Sayward v. Denny, 159 U. S. 180, 183;
> Hardy v. Illinois, 196 U. S. 78;
> Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 97."

Cited with approval in:

> Seaboard Air Line Ry. v. Duvall, *supra*, page 487.

It cannot be said that by indirection, or as a necessary or any effect of the decision of the Supreme Court of California in respect to the zoning ordinances, that said court sustained the validity of the said setback ordinance. The issues in respect to the zoning ordinances and the setback legislation were not related and were wholly independent, so that the action of the state court in declining, for the reason stated, to act upon the latter ordinance, must be construed in no other manner than as a failure to determine this particular question. If it had seen fit to render judgment, that tribunal, with manifest consistency, could have held adversely as to the constitutionality of the setback ordinance. Its conclusions sustaining the validity of the zoning ordinances would not in any manner be affected thereby. This issue being undecided, the plaintiffs in error cannot seek redress in this court. And if through any possibility they should prevail in the errors assigned as to the zoning ordinances, they must either litigate further in the state courts the question of the constitutionality of the said setback ordinance, or in lieu thereof secure the issue of a building permit complying with its regulations.

The Comprehensive Zoning Ordinance of the City of Los Angeles, Ordinance No. 42666 (New Series), and Ordinance No. 44668 (New Series) Amendatory Thereof, Are a Proper Exercise of the Police Power and Do Not Invade the Federal Constitution.

In respect to the general issue, counsel are pleased to state it to be as follows:

"Whether a city may divide its territory into zones and prohibit in certain of such zones, uses of property which are not in any way harmful and cannot be classified as uses which constitute nuisances *per se* or which may become nuisances because of the manner in which they are conducted." (Ptffs. brief, p. 17.)

In this manner the assertion of invalidity and unconstitutionality of the ordinances is made to rest entirely upon a determination as to whether a particular use is harmful and within the classification of uses which constitute nuisances *per se* or which may become nuisances because of the manner in which they are conducted. The position of counsel, otherwise expressed, is that if the business be innocent harmless and useful, it is not subject to regulation. If it be harmful or of a noxious or offensive character, comprehending those uses which are nuisances *per se*, or which are likely to become such, they are subject to zoning regulation. As a corollary, they conclude that a man has a natural right, not subject to regulation, to make any conceivable use which he may desire of his property, provided only that that use be not one classified as a nuisance *per se* or likely to become one.

The very issue as defined by counsel is based upon a false concept which does violence and is contrary to the fundamental and basic principles governing the exercise of police power firmly established by numerous decisions both of the Federal and state courts. The exercise of the police power cannot be made to rest upon the question as to whether a particular use does or does not fall within the classification of those uses which are harmful and which constitute nuisances *per se* or which may become nuisances because of the manner in which they are conducted.

There is a wide distinction between the lawful exercise of authority under the police power in relation to zoning and the regulation of so-called nuisance occupations. If, following the reasoning of counsel, it could be said that this were all that sanctioned the authority to regulate by zoning under the police power, it would seem that such regulation must be governed entirely by the law of nuisances. This confusion of the law of nuisances, as such nuisances have been heretofore dealt with by the courts, is one of common error in dealing with the regulatory provisions of such ordinances under the police power. The law of nuisances of necessity is directed toward particular cases, and each case must be the subject of judicial scrutiny and appropriate remedy. Zoning does not treat of particular cases, except as they may be a part of general situations; the regulations applied are those which the legislative body may determine are generally requisite in prescribed areas; it is effective in a negative sense in prohibiting improper uses by permitting only harmonious and related uses; it sensibly and logically classifies uses, confining them in areas

to which they are logically suited by environment and growth, and thus brings about an orderly growth of the entire community for the general prosperity and welfare, in lieu of an unregulated, heterogeneous and inharmonious development.

This confusion of the police power with the law governing nuisances was indicated in the case of *Bacon v. Walker*, 204 U. S. 311, and the distinction between the two clearly defined by the Supreme Court of the United States in this language:

> "These cases make it unnecessary to consider the argument of counsel based upon what they deem to be the limits of the police power of a state, and their contention that the statute of Idaho transcends those limits. It is enough to say that they have fallen into the error exposed in *Chicago, Burlington & Quincy Railway v. Drainage Commissioners*, 200 U. S. 561, 592. In that case we rejected the view that the police power cannot be exercised for the general welfare of the community. That power, we said, embraces regulations designed to promote the public health, the public morals or the public safety."

After quoting numerous questions formulated by counsel, designed to show that the act in question was unreasonable and an arbitrary discrimination, the court continued:

> "This view of the power of the state, however, is too narrow. *That power is not confined, as we have said, to the suppression of what is offensive, disorderly or unsanitary.* It extends to so dealing with the conditions which exist in the state as to bring out of them the greatest welfare of its people. This is the principle of the cases which we have cited." (Italics ours.)

The general question, therefore, is not as stated by counsel. As we conceive it, the question of the legality of the use regulations imposed by the ordinances under consideration will depend, not upon a determination as to whether the excluded uses are inherently harmful or nuisances *per se* or likely to become such, but upon a consideration of whether such excluded uses, in the particular locality prescribed by the zone and under all the circumstances, would not, in reality, be objectionable in fact as well as law, to the extent that the municipality may take cognizance of such non-conforming and inharmonious uses where the same are shown to be detrimental and injurious to the well-being of others. For if the use be objectionable in fact, then a regulation imposed by a municipality designed to suppress such uses of property within the zone and permit the existence of related and harmonious uses in the interest of general welfare, is entirely authorized, unless it be affirmatively established that such a regulation cannot have that result. The rightful concern of government is the effect upon the general welfare, peace and prosperity resulting from the existence and conduct of the use, business or occupation in the particular locality and under all the circumstances, rather than a consideration of the use, business or occupation as constituting a nuisance in law. Thus a business or occupation entirely innocent, inoffensive and innoxious, to use the descriptive language employed by counsel, in one locality under the conditions there maintaining, may cease to be such and become a nuisance in fact in a different locality and under different circumstances.

As this Honorable Court stated in the recent case of *Village of Euclid v. Ambler Realty Co., supra*, page 171:

> "Thus the question whether the power to forbid the erection of a building of a particular kind or for a particular use, like the question whether a particular thing is a nuisance, is to be determined, not by an abstract consideration of the building or of the thing considered apart, but by considering it in connection with the circumstances and the locality.."

Citing: Sturgis v. Bridgeman, L. R. 11 Ch. Div. 852, 865-C.

> "A nuisance may be merely a right thing in the wrong place,—like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."

Citing: Radice v. New York, 242 U. S. 292, 294.

As was expressed by the Supreme Court of Iowa in the case of *City of Des Moines v. Manhattan Oil Co.*, 184 N. W. 823, 829:

> "That a statute or city ordinance or police regulation forbids acts theretofore innocent and lawful affords no ground for holding such legislation either void or unreasonable. A very large proportion of all our laws, both state and municipal, are of that character. As we have before said, when people are brought together in increasingly crowded masses, it is essential to peace, good order and general welfare that the individual shall submit to reasonable restrictions upon his natural rights for the public good, and it is not at all strange or unusual that he often finds himself forbidden under penalty to do things which but for some police regulation would be his unquestionable right."

And to the same point, that court said further:

> "Naturally what regulations may reasonably be required or imposed for that purpose by the constituted authorities varies with the varying conditions with which our lawmakers have to deal, and subject only to constitutional limitations, the state, acting by its Legislature, has the right to select the subjects of regulation and prescribe rules for making such regulations effective. To justify the exercise of such authority it is not necessary that the subject thereof shall be inherently wrong; nor is the fact that such regulation may operate to restrict the individual citizen in the use of his own property, or even in his liberty, is not of itself sufficient to render the regulation or restriction void."

Citing:

> "Dillon Mun. Corp. (4th Ed.) 141;
> Lawton v. Steele, 152 U. S. 136;
> Barbier v. Connolly, 113 U. S. 27;
> Powell v. Pennsylvania, 127 U. S. 678;
> Welch v. Swasey, 214 U. S. 91;
> N. W. Laundry v. Des Moines, 239 U. S. 486;
> Booth v. Illinois, 184 U. S. 425."

In *Hadacheck v. Los Angeles,* 239 U. S. 394, 411, this court, citing with approval a similar principle given expression to in the case of *Reinman v. Little Rock,* 237 U. S. 171, said:

> "The ordinance passed upon prohibited the conduct of the business within a certain defined area in Little Rock, Arkansas. This court said of it: Granting that the business was not a nuisance *per se,* it was clearly within the police power of the state to regulate it, 'and to that end to declare that in particular circumstances and in particular

localities a livery stable shall be deemed a nuisance in fact and in law.'"

The limitations within which government may thus express its power were given expression to in *Welch v. Swasey*, 214 U. S. 91. The court, per Peckham, J., stated:

> "The statutes have been passed under the exercise of so-called police power, and they must have some fair tendency to accomplish, or aid in the accomplishment of some purpose, for which the Legislature may use the power. If the statutes are not of that kind, then their passage cannot be justified under that power. These principles have been so frequently decided as not to require the citation of many authorities. If the means employed, pursuant to the statute, have no real substantial relation to a public object which government can accomplish; if the statutes are arbitrary and unreasonable and beyond the necessities of the case; the courts will declare their invalidity. The following are a few of the many cases upon this subject:
>
> Mugler v. Kansas, 123 U. S. 623, 661;
> Minnesota v. Barber, 136 U. S. 313, 320;
> Jacobson v. Massachusetts, 197 U. S. 11, 28;
> Lochner v. New York, 198 U. S. 45, 57;
> Chicago Ry. Co. v. Drainage Commissioners, 200 U. S. 561, 593."

Having defined the true issue in respect to the constitutionality of the said zoning ordinance, we shall proceed to establish that by this ordinance the means employed of specifying areas throughout the city and of regulating appropriate uses of property therein, have

a real and substantial relation to a public object which government can accomplish, comprehending the several objects for which the police power may be exercised; that said ordinance is neither arbitrary nor unreasonable, nor beyond the necessities of the case.

Considerations Which Sustain the Constitutionality of the Zoning Ordinance in Question.

An issue pertaining to the constitutionality of zoning, as expressed in this and like laws, must involve a consideration of these elements, viz.: the need for the regulation, the means adopted in its application, and, finally, the character and nature of the regulation and whether it bears a substantial relationship to those purposes and objects that justify the exercise of the police power or, otherwise expressed, whether the regulation as designed will reasonably accomplish the social purposes which have called it into existence.

Comprehensive zoning, as that term is defined, confessedly represents a recent type of zoning and may be said to be comprehensive, not only in the sense of including the entire municipal area, but comprehensive in its application to the subjects of regulation. The demand and need for such regulation is amply indicated, we believe, in the extent to which comprehensive zoning in one form or another has been adopted by municipalities in various states throughout the nation, as evidenced not only by numerous court decisions dealing with this form of legislation, but by reports of the United States Government itself.

The Supreme Court of California, in *Miller v. Board of Public Works*, 195 Cal. 477, said:

"There can be no question but that there is a prevailing and preponderating sentiment in favor of necessary and reasonable zoning. The growth of this sentiment has been rapid and widespread. The first comprehensive zoning ordinance was that of New York City enacted in 1916. According to a recent bulletin of the United States Department of Commerce, 35 states and the District of Columbia have adopted this form of regulation; 221 municipalities have been zoned and over 22,000,000 inhabitants, aggregating 40 per cent of the urban population of this country, are living in zoned territory. The rapidity of the growth of the sentiment in favor of comprehensive zoning, coupled with the extensive and successful application of the idea, are evidence of its present potential value for the promotion and perpetuation, along broader and better lines, of the moral and material welfare of a people."

This statement related to the status of zoning prior to the date of the decision, viz.: February, 1925.

This court, in *Village of Euclid v. Ambler Realty Co., supra*, page 175, gave similar recognition to this movement, stating:

"Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect to the use and occupation of private lands in urban communities.

"Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable.

"And in this there is no inconsistency, for while the meaning of constitutional guarantees never varies, the scope of their applications must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise."

In the same case this court cited its approval of the case of *Aurora v. Burns,* 39 Ill. 84, 93, 95, as follows:

"The constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the state, either directly or through some public agency by its sanction, to limit individual activities to a greater extent than formerly. With the growth and development of the state, the police power necessarily develops, within reasonable bounds, to meet the changing conditions."

That municipal governments which contact most closely with the problems attendant "upon the growth and density of population, and the ceaseless changes taking place in method and manner of carrying on the multiplying lines of human industry" (*City of Des*

Moines v. Manhattan Oil Co., 184 N. W. 826), should in this manner legislate with a view of suitably directing and controlling their growth and development, is indicative, at least, of a need for legislation of this character as a means of checking and overcoming the evils arising from an unregulated and unrestrained use of property for every activity that may be said to be innocent, innocuous and harmless.

Counsel have seen fit to repeatedly characterize the ordinances in question, and by indirection all similar legislation, by such unfortunate descriptive language as "communism" and "paternalism." Even if it be assumed that such laws transgress constitutional limitations, it must be recognized that this type of legislation is today widespread and represents legislative action by constituted authority under established and accepted forms of democratic government existing throughout the states of the United States, enacted in unquestioned good faith and in the interests of the social and material welfare and prosperity of the people within their respective jurisdictions. The ordinances in question do not stand alone as representative of radical or extreme legislation, but by analogy and relationship are expressive of a similar movement in various municipalities to resort to the directive power of government itself to suitably control massed activities in congested urban localities for the protection of the general welfare. Certainly, this effort of municipal legislative bodies should command a respectful and dignified discussion even from those who may be burdened by the regulations or may even question the right of government to impose them. It is

abhorrent to suggest that our democracy has become thus perverted.

The reasons calling this ordinance and like comprehensive zoning legislation into existence, as we perceive it, may be stated as follows:

The rapidly increasing population in urban centers, with the consequent congestion and complexity of every form of human endeavor, a situation becoming more and more in evidence, alone will sustain the right and justify government in legislating to prevent consequent evils if the same detrimentally or injuriously affect the general welfare and public interests, or reasonably tend to do so. New and changing conditions thus confronted may properly receive the attention of the sovereign power, and its reserve powers may be lawfully exerted to supervise, regulate and control, under the police power, the individual in his activities and the use of that which he possesses, where necessary to safeguard the interests and welfare of the many, and as a protective measure to insure the advancement of society in general.

To prevent that which is injurious and inimical to the interests of organized society is the imperative duty of government, against which the guarantees of the Constitution to the individual cannot stand. Property and natural rights are possessed by the individual subordinate to the higher considerations of government and its dominant powers may be called into being in the interests of the higher concerns of society where chang-

ing conditions and circumstances indicate a substantial need for protective measures.

Canfield v. United States, 167 U. S. 518;
Bacon v. Walker, 204 U. S. 311;
Brown v. Walling, U. S. 390;
Plessy v. Ferguson, 163 U. S. 537.

Zoning legislation of this character may likewise be justified as providing a more equitable and impartial plan for the application of use regulations, and, in consequence, a more satisfactory means of accomplishing the purposes of zoning in relation to the general welfare.

Though the said ordinances are referred to as a new and modern type of zoning law, the basic underlying principle of regulation through zoning under the police power to which it gives expression is not new. The decisions of the state of California particularly disclose the imposition of police power regulation in this manner as early as 1884 (see *Ex parte Moynier*, 65 Cal. 33), and numerous cases since give evidence of a definite forward growth and expansion of the power under sanction of the courts. Not a few of these cases have involved Federal questions and have had the approval of this court. The following may be said to be the principal California cases involving legislation of this character in one form or another, viz.:

Ex parte Moynier, 65 Cal. 33, 2 Pac. 728;
Re Hang Kie, 69 Cal. 149;
Ex parte Laccy, 108 Cal. 326, 330;
Grumbach v. Lelande, 154 Cal. 679;
Ex parte Quong Wo, 161 Cal. 220;

In re Montgomery, 163 Cal. 457, 127 Pac. 1070;
Odd Fellows' Cemetery Assn. v. San Francisco, 140 Cal. 226;
Ex parte Hadacheck, 165 Cal. 416, affirmed 239 U. S. 394;
Brown v. Los Angeles, 183 Cal. 783;
Boyd v. Sierra Madre, 41 Cal. App. 520;
Lan Kee v. Wilde, 41 Cal. App. 528;
Curtis v. County of Los Angeles, 172 Cal. 230.

It is not our purpose to analyze each of the above cited cases, as we believe a general statement designed to indicate the manner in which they represent a gradually expanding application of governmental regulation through zoning, thus affording, as it were, a background for the present equitable and comprehensive plan of regulation, will justify reference to them in this brief. These cases include regulations of various character, the earliest, perhaps, being adopted by the city of San Francisco, designed to exclude Chinese laundries from specified districts, usually residential in character. Much litigation resulted therefrom, some of which came before this Honorable Court.

See:

Barbier v. Connolly, 113 U. S. 27;
Soon Hing v. Crowley, 113 U. S. 703;
Yick Wo v. Hopkins, 118 U. S. 356.

This particular type of legislation was upheld when the ordinances were properly drawn, and were reasonable in the creation of permissive areas, though their constitutionality was made to rest upon considerations

of sanitation, yet the right of segregation of businesses and occupations by zoning was recognized and clearly affirmed. Thereafter approval was given to a like manner of regulation as applied to such businesses and occupations as carpet cleaning works *(Ex parte Lacey, supra)*, sale of intoxicating liquors *(Grumbach v. Lelande, supra)*, woodyards, haybarns and laundries *(Ex parte Quong Wo. supra)*,—legislation that was limited to subjects which were undeniably closely akin to nuisances.

However, in the case of *In re Montgomery, supra,* we find a new and radically different type of zoning ordinance of the city of Los Angeles, which might be characterized, in a sense, as a comprehensive zoning ordinance, far-reaching in the scope of its regulations. This ordinance was enacted in 1909. It constituted the entire area of the city a residential district or zone, with the exception of certain specified areas which were classified as industrial zones. Control of business and industrial enterprises in the residential district or zone was exerted by the legislative body; in fact, no industry or business enterprise could locate in the residential district except that the Council permit the same and designate the area. In this manner were created permissive industrial areas spotting the residential district. The constitutionality of this ordinance was sustained by the Supreme Court of California in the above mentioned case, which involved the ordinance in its application to lumber yards in residential districts.

This selfsame ordinance was involved in *Ex parte Hadacheck, supra,* in its application to a brick yard in a residential district. This case was taken up on error to this Honorable Court, where the constitutionality of the ordinance was sustained in the case of *Hadacheck v. Los Angeles,* reported in 239 U. S. 394.

The latter cases are significant in that they recognized and affirmed not only a much broader and extended field of municipal regulation under the police power, but the right to exert that power in relation to a much more numerous classification of subjects. The authrity of government was not made to depend upon the character of the use, judged from the standpoint of the law of nuisances, but, as we have already had occasion to point out, it was perceived by the courts that a use lawful and harmonious in itself might because of the locality and surrounding conditions be a nuisance in fact, or as frequently expressed, a right thing in the wrong place and therefore a proper subject of police regulation.

The method of zoning employed in the ordinance in the *Montgomery* and *Hadacheck* cases stands in striking contrast with the present carefully planned and comprehensive ordinance. The former method was obviously open to criticism, though not legally objectionable, as the above cases decided; for a city so zoned became a patchwork of excepted areas without connection or relation one with the other, created through no stable, settled, consistent or related policy or plan; it could not take into account in a comprehensive manner many of

the elements of growth and development necessarily involved in the expansion of a large municipality, the congestion of population, the establishment and protection of home and residence uses, or the needed direction and regulation of commercial and industrial activities, particularly in reference to such homes and residences. In lieu of a general, consistent, harmonious zoning treatment of the entire city was substituted an individual, inharmonious consideration of each excepted area apart from and unrelated to any other area, and each area considered alone.

The ordinance here in question, in opposition to such earlier effort, we submit, represents a constructive, comprehensive program of zoning based upon a full and careful survey and study of the entire city, district by district, parcel by parcel, under the guidance of a city planning commission. This legislation is the result of an orderly and consistent policy of city planning, based upon far-reaching surveys and upon the logical property uses in each locality, affording full opportunity to property owners for protest and hearings and a determination of the controversies involved.

The present law is more extended in its application to property and to the subjects of regulation. Yet, if we show, as we confidently expect to, that such subjects are properly matters of police regulation, that the means employed in the application of the regulations are far more equitable and impartial and are, therefore, better calculated to accomplish the purposes for which the law has been enacted than under the old order of things, then, we submit, its constitutionality must be sustained.

The Provision of the Ordinance for the Creation of Residential Districts or Zones and for the Exclusion of Business Therefrom Is a Lawful Regulation Under the Police Power Which Does Not Entrench Upon Constitutional Guarantees.

The plaintiffs in error desire to compel by a writ of mandamus the issuance of a permit to construct a business building upon a lot zoned to "B" or multiple residence uses. Hence their objections are directed primarily, if not altogether, to the provisions of the ordinance permitting structures and land in "A" and "B" zones to be used only for residential purposes, and inhibiting the use of such land or the buildings thereon for any business or industrial purposes. These provisions are assailed on the ground that the prohibition of business within residential zones is absolute, including not only businesses which are nuisances *per se* or which are likely to become such, but also those businesses which are, to employ counsels' descriptive language, "harmless, lawful and innocent." This premise finds expression in counsels' argument in the oft repeated contention that the police power cannot be exercised to restrict the use and enjoyment of property for any innocent, harmless or lawful purpose, and that the general welfare of society can only be affected and the police power resorted to when the use is one constituting a nuisance *per se* or one which is likely to become such, which then can be the subject of regulation under the maxim *sic utero tuo, ut alienum non laedas.*

An additional objection of unconstitutionality is offered, that the ordinance constitutes a taking of plaintiffs' property for a public use without compensation

and that this cannot be effected except by recourse to the power of eminent domain, without violating constitutional guarantees.

It is a false premise to assert that the police power is limited to the prohibition or regulation of nuisances *per se* or those which are likely to become such, and to quote the maxim *sic utero tuo, ut alienum non laedas,* in support of such a premise is, in reality, begging the question. It is likewise a meaningless generality to state, as counsel do, that the police power, when exercised for the general welfare, is to be limited to that which is necessary for the protection of the public as distinguished from that which is beneficial, useful or desirable. We have already quoted abundant authority holding that a thing not a nuisance in one place may, by virtue of the particular locality and the surrounding circumstances, be a nuisance in another, and yet not come within the category of those things previously regarded as nuisances *per se* or likely to become such. The legislative body may well perceive in such situations compelling need of regulation for the protection of the public, and it is clearly within its jurisdiction to ordain that such uses shall be confined to appropriate areas, and by this segregation avoid contacts that will injuriously affect the general welfare. The use of property for business in residential areas and in close contact with homes is, we believe, a potent illustration of this principle.

This, fundamentally, is the power of zoning, and its constitutionality is now fully recognized by the great weight of authority which we believe was accurately expressed by the learned Supreme Court of California in the instant case, in this manner:

"The first contention of petitioners was involved in the case of *Miller v. Board of Public Works*, 195 Cal. 477 (234 Pac. 381). That case involved the question of whether or not zoning of any character, comprehensive or otherwise, save and except for the purpose of prohibiting nuisances or 'near-nuisances' was a valid exercise of the police power. That case has this day been decided and it is held therein that an enactment by a municipality of an ordinance, pursuant to a general comprehensive zoning plan, based upon considerations of public health, safety, morals, or the general welfare, applied fairly and impartially, which ordinance regulates, restricts and segregates the location of industries, the several classes of business, trade, or calling and the location of apartment or tenement houses, club-houses, group residences, two-family dwellings, and the several classes of public and semi-public buildings, is a valid exercise of the police power."

Citing:

"*In re* Opinion of Justices, 234 Mass. 597, 127 N. E. 525;

State *ex rel.* Carter v. Harper, 182 Wis. 148, 33 A. L. R. 269, 196 N. W. 451;

State *ex rel.* Civello v. New Orleans, 154 La. 271, 33 A. L. R. 260, 97 South. 440;

Ware v. City of Wichita, 113 Kan. 153, 214 Pac. 99;

City of Des Moines v. Manhattan Oil Co., 193 Iowa 1096, 23 A. L. R. 1322, 184 N. W. 823, 188 N. W. 921;

Spector v. Building Inspector of Milton (Mass.), 145 N. E. 265." [R. 57.]

That the court was not in error in so holding is fully indicated by the more recent decision of this Honorable

Court in the case of *Village of Euclid v. Ambler Realty Co., supra*, pp. 176-177, where it was said:

> "In the light of these considerations, we are not prepared to say that the end in view was not sufficient to justify the general rule of the ordinance, although some industries of an innocent character might fall within the prescribed class. It cannot be said that the ordinance in this respect 'passes the bounds of reason and assumes the character of a merely arbitrary fiat.' Purity Extract Co. v. Lynch, 226 U. S. 192, 204.
>
> "Moreover, the restrictive provisions of the ordinance in this particular may be sustained upon the principles applicable to the broader exclusion from residential districts of all business and trade structures, presently to be discussed.
>
> * * * * * * * * *
>
> "This question involves the validity of what is really the crux of the more recent zoning legislation, namely, the creation and maintenance of residential districts, from which business and trade of every sort, including hotels and apartment houses, are excluded. Upon that question this court has not thus far spoken.
>
> "The decisions of the state courts are numerous and conflicting; but those which broadly sustain the power greatly outnumber those which deny it altogether or narrowly limit it; and it is very apparent that there is a constantly increasing tendency in the direction of the broader view. We shall not attempt to review these decisions at length, but content ourselves with citing a few as illustrative of all.
>
> "As sustaining the broader view, see:
> Opinion of the Justices, 234 Mass. 597, 607;
> Inspector of Buildings of Lowell v. Stoklosa, 250 Mass. 52;

Spector v. Building Inspector of Milton, 250 Mass. 63;
Brett v. Building Commissioner of Brookline, 250 Mass. 73;
State v. City of New Orleans, 154 La. 271, 282;
Lincoln Trust Co. v. Williams Bldg. Corp., 229 N. Y. 313;
City of Aurora v. Burns, 319 Ill. 84, 93;
Deynzer v. City of Evanston, 319 Ill. 226;
State *ex rel.* v. Houghton, 164 Minn. 146;
State *ex rel.* Carter v. Harper, 182 Wis. 148, 157-161;
Ware v. City of Wichita, 113 Kan. 153;
Miller v. Board of Public Works, 195 Cal. 477, 486-495;
City of Providence v. Stephens (R. I.), 133 Atl. Rep. 514.

"For the contrary view see:

Goldman v. Crowther, 147 Md. 282;
Ignaciunas v. Risley, 98 N. J. L. 712;
Spann v. City of Dallas, 111 Tex. 350.

"As evidence of the decided trend toward the broader view, it is significant that in some instances the state courts in later decisions have reversed their former decisions holding the other way. For example, compare State *ex rel.* v. Houghton, *supra,* sustaining the power, with State *ex rel.* Lachtman v. Houghton, 134 Minn. 226; State *ex rel.* Roerig v. City of Minneapolis, 136 Minn. 479; and Vorlander Hokenson, 145 Minn. 484, denying it, all of which are disapproved in the Houghton case (p. 151) last decided.

"The decisions enumerated in the first group cited above agree that the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of

the community. Some of the grounds for this conclusion are—promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community by excluding from residential areas the confusion and danger of fire, contagion and disorder which in greater or less degree attach to the location of stores, shops and factories.

"Another ground is that the construction and repair of streets may be rendered easier and less expensive by confining the greater part of the heavy traffic to the streets where business is carried on."

As suggesting some of the considerations indicating that such regulations have a substantial relationship to general welfare and other purposes justifying the exercise of the police power, we quote from the decision in *State v. New Orleans,* 154 La. 271, 282, 283, cited with approval in *Village of Euclid v. Ambler Realty Co., supra,* as follows:

"In the first place, the exclusion of business establishments from residence districts might enable the municipal government to give better police protection. Patrolmen's beats are larger, and therefore fewer, in residence neighborhoods than in business neighborhoods.

"A place of business in a residence neighborhood furnishes an excuse for any criminal to go into the neighborhood, where, otherwise, a stranger would be under the ban of suspicion. Besides, open shops

invite loiterers and idlers to congregate; and the places of such congregations need police protection.

"In the second place, the zoning of a city into residence districts and commercial districts is a matter of economy in street paving. Heavy trucks, hauling freight to and from places of business in residence districts, require the city to maintain the same costly pavement in such districts that is required for business districts; whereas, in the residence districts, where business establishments are excluded, a cheaper pavement serves the purpose. * * *

"Aside from considerations of economic administration, in the matter of police and fire protection, street paving, etc., any business establishment is likely to be a genuine nuisance in a neghborhood of residences. Places of business are noisy; they are apt to be disturbing at night; some of them are malodorous; some are unsightly; some are apt to breed rats, mice, roaches, flies, ants, etc. * * *

"If the municipal council deemed any of the reasons which have been suggested or any other substantial reason a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfactory to a majority of the citizens, their recourse is to the ballot—not the courts."

In the earlier Massachusetts case, *In re Opinion of the Justices*, 127 N. E. 525, 527, 531, 532, decided May, 1920, the Supreme Court of that state said:

"An ordinance or by-law which segregates manufacturing and commercial buildings on the one

side, from homes and residences on the other, is justified by the broad conceptions of the police power created by amendment 60. It might be warranted independent of that amendment under appropriate circumstances, at least to a limited extent, in the interests of the public health, safety or morals."

And further, the court stated:

"The segregation of manufacturing, commercial and mercantile business of various kinds to particular localities, when exercised with reason, may be thought to bear a rational relation to the health and safety of the community. We do not think it can be said that circumstances do not exist in connection with the ordinary operation of such kinds of business which increase the risk of fire, and which renders life less secure to those living in homes in close proximity. Health and security from injury to children and the old and feeble and otherwise less robust portion of the public well may be thought to be promoted by the requiring that dwelling houses be separated from the territory devoted to trade and industry. The suppression and prevention of disorder, the extinguishment of fires and the enforcement of regulations for street traffic, and other ordinances designed rightly to promote the general welfare, may be facilitated by the establishment of zones or districts for business as distinguished from residence.

"Conversely, the actual health and safety of the community may be aided by excluding from areas devoted to residence the confusion and danger of fire, contagion and disorder which in greater or less degree attach to the location of stores, shops

and factories. Regular and efficient transportation of the bread-winners to and from places of labor may be expedited. Construction and repair of streets may be rendered easier and less expensive if heavy traffic is confined to specified streets by the business there carried on. It is easy to imagine ordinances enacted under the assumed authority of the proposed act which would exceed the constitutional limits of the police power and be an indefensible invasion of private rights. But it cannot be presumed in advance that municipalities will go outside their just powers and unwarrantably interfere with property. Cases of that sort must be dealt with if and when they arise."

In respect to the second objection advanced, that the regulations of the ordinance cannot be enforced except through the exercise of the power of eminent domain, we think it enough to say that it has been held and affirmed so often as now to be unquestioned, that lawful restrictions imposed under the police power are a regulation and not a taking of property, and that such regulations may be enforced without resorting to eminent domain. It is elemental to say that all rights of property as well as of person are held subject to the superior right of government to regulate by law the conduct of the individual for the common good of all.

The restrictions imposed upon the use of property by zoning and other police power legislation, unquestionably limit the use and enjoyment of property, but the necessary exercise of this power frequently has this effect. A like criticism can be made of ordinances limiting the height of buildings and building legislation compelling the use of fireproof materials, etc. In the city of Los Angeles

a building height limitation of 150 feet above the street level is effective by charter provision. Such law manifestly has the effect of limiting the enjoyment of property and its value as well, for if it were lawful to construct business buildings to heights greater than 150 feet, their usefulness would be enlarged and their potential income increased.

Appropriate regulation under the police power restricting the use of property for the benefit of society at large and in the interests of general welfare, by zoning, does not take such property for a public use in the sense contemplated by the Constitution, and there is, therefore, no requirement of compensation.

The principle is well stated in *Mugler v. Kansas,* 123 U. S. 623, 669, relied upon by counsel as an authority, where this Honorable Court said:

> "The power which the states have of prohibiting such use by individuals of their property as will be prejudicial to the health, the morals, or the safety of the public, is not—and, consistently with the existence and safety of organized society, cannot be—burdened with the condition that the state must compensate such individual owners for pecuniary losses they may sustain, by reason of their not being permitted, by a noxious use of their property, to inflict injury upon the community. The exercise of the police power by the destruction of property which is itself a public nuisance, or the prohibition of its use in a particular way, whereby its value becomes depreciated, is very different from taking property for public use, or from depriving a person of his property without due process of law."

The ordinance involved in the instant case is identical in its essential provisions as to the character of regulations and the creation of zones, (although, as heretofore pointed out, less restrictive in its detailed requirements) with the legislation considered by this court in the *Village of Euclid* case and the many other cases decided by state courts cited in that case. The reasoning and conclusions of the court therein affirming its legality and constitutionality, are so pertinent to this ordinance that it must be regarded as an authority directly sustaining the constitutionality of the legislation attacked by this proceeding and approving the conclusion that the state court was not in error in deciding this point as it did.

Discussion of Authorities Cited by Plaintiffs in Error.

We deem it necessary to make brief reference to authorities cited and relied upon by opposing counsel. With the exception of those decisions, constituting the minority opinion of the courts in the several states, holding comprehensive zoning ordinances to be invalid, these authorities generally are concerned with the application of the police power under particular facts and circumstances; and where the right to exercise the power is denied, the facts clearly show an abuse and excess of authority violative of well founded principles announced by the courts limiting the use of such reserve powers of government.

Such was the situation in the case of *Pennsylvania Coal Co. v. Mahon,* 260 U. S. 393. The statute in this case failed because it amounted, not to a regulation but to a prohibition. The statute entirely prohibited the mining of coal, and this, the court held, destroyed the

right to coal. The right to coal, the thing possessed, could not be used or enjoyed as property except that it be mined. Therefore, an act preventing the mining of coal would have very nearly the same effect for constitutional purposes, the court held, as appropriating or destroying it.

Likewise, in *Meyer v. Nebraska*, 262 U. S. 392, where was involved a statute which forbade the teaching in schools of any subject except in English. Here, too, the statute failed to impose a regulation, but actually prohibited the carrying on of a legal occupation, viz: the teaching of foreign languages, and hence the court stated that it was constrained to conclude that the statute as applied was arbitrary and without reasonable relation to any end within the competency of the state.

The cases of *Buchanan v. Warley*, 245 U. S. 72, and *Berea College Case*, 211 U. S. 45, are clearly not applicable to the instant case. The first of these cases involved an ordinance which attempted to compel the segregation of whites and negroes by making it unlawful for any colored person to move into and occupy as a residence, place of abode, or to establish and maintain as a place of public assembly any house in any block in which a greater number of houses were so occupied by white people than by colored people. The court held, in effect, that the ordinance interfered with the right to freely contract guaranteed by the Constitution. The court reviewed and distinguished the case from *Plessy v. Ferguson*, 163 U. S. 537, which sustained a state statute of Louisiana requiring railroad companies carrying passengers to provide in every coach equal but

separate accommodations for the white and colored races, the ground of distinction being that the provision of the statute of Louisiana did not run counter to the provisions of the Fourteenth Amendment, for the reason that there was no attempt to deprive persons of color of transportation in the coaches of the public carrier, and the statute provided for equal though separate accommodations for the white and colored races. In the *Berea College Case* it was held that a grant of authority by the state to a corporation to teach and educate all persons was not rendered invalid by an amendment to the original charter separating the races by time or place of instruction.

Lawton v. Steele, 152 U. S. 133, was based upon the well recognized rule that the regulation imposed under the police power upon lawful business must not exceed the necessities of the case, nor amount to a prohibition of the business. Following this rule, the court held that a statute of the City of New York enacted under the police power for the preservation and protection of fish, providing that nets maintained in the waters of the state in violation of the statutes may be summarily destroyed by any person, and that it shall be the duty of certain officers to forthwith destroy them, and that no action for damages should lie, was a proper regulation of the manner of fishing in the waters of that state. It did not prohibit fishing by one using nets of the regulation size.

Mclean v. Arkansas, 211 U. S. 539, sustained a statute of Arkansas requiring coal to be measured for payment of miners' wages before screening, and made the act

applicable to mines where more than ten miners were employed. The court stated:

> "The Legislature of a state is primarily the judge of the necessity of exercising the police power and courts will only interfere in case the act exceeds legislative authority; the fact that the court doubts its wisdom or propriety affords no ground for declaring a state law unconstitutional or invalid."

Murphy v. California, 225 U. S. 623, related to an ordinance of the city of South Pasadena, California, passed in pursuance of the police power, prohibiting the keeping of billiard halls for hire, except in the case of hotels having twenty-five rooms or more, for use of regular guests. The court held that such ordinance was not unconstitutional as depriving the owners of billiard halls not connected with hotels of their property without due process of law, or as denying them equal protection. The basis of the decision is seen in the statement of the court that "While the Fourteenth Amendment protects the citizen in his right to engage in any lawful business, it does not prevent a state from regulating or prohibiting a non-useful occupation which may become harmful to the public." In other words, the business regulated by the ordinance in question was not one that came within the category of lawful occupations which may be carried on as of right, but belonged to the type of non-useful occupations which depend for their existence upon the permission of the municipality.

Adams v. Tanner, 244 U. S. 590. In this case it was held that the business of securing honest work for the unemployed in return for an agreed consideration, was

a useful and legitimate business which, though subject to regulation under the state police power, could not be entirely forbidden by an act of the state without violating the guaranty of liberty secured by the Fourteenth Amendment. The court distinguished it from *Murphy v. California, supra,* stating:

> "Neither does it (i. e. 14th Amendment) prevent a municipality from prohibiting any business which is inherently vicious and harmful. But, between the useful business which may be regulated and the vicious business which can be prohibited lie many non-useful occupations, which may, or may not be harmful to the public, according to local conditions, or the manner in which they are conducted."

Boyd v. United States, 116 U. S. 616. This decision held unconstitutional a section of an act amending the customs revenue laws which authorized a court of the United States, in revenue cases, on motion of the government attorney, to require the defendant to produce in court his private books and papers, and in the event of his failure to do so, the allegations of the Federal attorney were to be taken as confessed. Such suits were for penalties, and the court held that they were criminal proceedings; that the seizure or compulsory production of a man's private papers to be used in evidence against him was equivalent to compelling him to be a witness against himself; and that the further provision of the act that their non-production should be a confession of the allegations which it was contended they would prove was within the prohibition of the Fifth Amendment. The issue in the case was directed solely to an encroachment upon the constitutional immunities guaranteed to

one against whom a criminal proceeding has been brought. These are the constitutional provisions for the security of persons and property to which the court refers.

It seems almost unnecessary to state that this case can by no stretch of the imagination have any bearing even upon the issue in the instant proceeding, involving as it does an asserted violation of the Fourteenth Amendment and the constitutional guarantees respecting the taking of property under the exercise of the police power.

Yates v. Milwaukee, 77 U. S. 497, 19 L. ed. 84.

The principle involved in this case is elementary and is clearly manifested in the decision of the court, to the effect that a mere declaration by a legislative body that a certain structure was an encroachment or obstruction did not make it so, nor could such declaration make it a nuisance unless it in fact had that character. The actions of legislative bodies, particularly where exercised for the purpose of abating public nuisances which are of a character to endanger life or property, must be real and be supported by facts justifying such course.

Mugler v. Kansas, supra, laid down the well established principle that the police power when exercised must show a real and substantial relation to those objects for which the power may be exercised, but sustained legislation in the exercise of the police power, prohibiting the manufacture and sale of liquor to be used as beverage and the use of property for its manufacture and sale. The Legislature declared such use to constitute a public nuisance, and the court fully sustained the

well recognized principle that such law could be enforced against the persons who at the time happened to own property whose chief value consisted in its fitness for such manufacturing purposes, without compensating them for the diminution in its value resulting from such prohibitory enactment. This case, we believe, is authority in support of some of the points made by defendants in error in the case at bar.

Van Horne's Lessee v. Dorrance, 2 Dal. 304. This case did not involve any police power regulations. As stated by the court, it involved questions of constitutional law in relation to a territorial controversy between the states of Pennsylvania and Connecticut. The land in question lay within the charter bounds of Pennsylvania. The settlers upon the land were Connecticut settlers, and the point was made that they were trespassers upon the territory of Pennsylvania. Plaintiff derived title through deed from the Six Nations and from charter grant to William Penn, the land in question being within the grant. The defendant, Dorrance, claimed under the Indian deed, which deed, it was claimed, was defective and faulty. Defendant went onto the property and rested his case upon the law of Pennsylvania, commonly called the Quieting and Confirming Act. This act, passed February 7, 1705, declared that if any person presumed to buy any land of the natives within the limits of the province, without leave from the proprietary thereof, every such purchase should be void and of no effect. By an act passed February 14, 1729, it was further declared that every grant, sale, contract, and every pretended conveyance and demise made

or thereafter made with any of the Indian natives for any lands within the limits of the province, without the order or direction of the proprietary or his commissioners, should be null and void. The court held, in effect, that the acts were unconstitutional, being *ex post facto*, because they wholly destroyed and took away property rights in one and vested them in another, and were designed, in effect, to oust from title and possession those who had acquired and settled upon lands and had full color of title thereto.

The inapplication of this case to the case at bar is apparent. The excerpt quoted by counsel to sustain the contention that the ordinance in the instant case takes property from one and gives it to another, when considered with the facts, shows it to be misconstrued and as not announcing the principle which counsel claim. The court's decision was directed to a manifest violation of the Constitution in the attempted legislative destruction of vested property rights.

Pfingst v. Senn, 94 Ky. 563, 23 S. W. 358. This decision held, in substance, that the prospective use of premises as an open-air pleasure resort or beer garden, would not be regarded as a nuisance, since such use of the place of itself would not necessarily constitute a nuisance, although it had been a nuisance because of the manner in which it had been previously conducted by other parties. This case is an old one, decided in 1893, and if such business could be carried on today, it goes without saying that it would be subject to the strictest regulation and control by municipal authorities, for the courts have long since affirmed that such business was

of a nuisance character, and that the right to conduct it rested upon the will of the municipality.

If any comment is to be made upon this citation, it is that counsel has the temerity to justify his asserted right to use his property for any lawful business purpose he sees fit by referring to a case affirming this right as to the conduct of a beer garden, a principle completely overthrown and at variance with prevailing law at the time of the adoption of the Eighteenth Amendment. We would respectfully refer counsel to the case of *Murphy v. California, supra.*

Wolff Packing Company v. Court of Industrial Relations, 262 U. S. 522. This action attacked the validity of the Court of Industrial Relations Act of Kansas. The Act created an industrial court and vested it with certain powers to hear and determine wage and employment controversies in certain industries affected with a public interest, such as those that manufacture and prepare food for human consumption, that manufacture clothing for human wear, and that produce any substance in common use for fuel. The purpose of the act was to provide a means for the settlement of controversies that might work a discontinuance of the industry or the production because of the peculiarly close relationship existing between the public and those engaged in such industry. The theory authorizing such legislation was thus stated by Mr. Chief Justice Taft:

> "The necessary postulate of the Industrial Court Act is that the state, representing the people, is so much interested in their peace, health, and comfort that it may compel those engaged in the manufacture of food and clothing, and the production of

> fuel, whether owners or workers, to continue in their business and employment on terms fixed by an agency of the state, if they cannot agree."

The court held, in effect, that an attempt by the state to create continuity of such businesses by requiring employers to pay wages fixed by an industrial court, and forbidding the employees to strike, violated the provision of the Fourteenth Amendment to the Federal Constitution forbidding deprivation of liberty and property without due process of law.

This case is distinguishable from the regulations of a zoning ordinance. Zoning regulations do not in any manner undertake to regulate any business as such, but restrict the use of land within prescribed areas to certain designated purposes and by this means compel the location of business and commercial enterprises, and other non-conforming uses, to areas wherein they may be conducted without detriment to the interests of others, thus accomplishing the general welfare purposes had in view. Such businesses or other use, where properly located, are carried on without interference from the zoning ordinance.

Burns Baking Company v. Bryan, 264 U. S. 504.

This case dealt with a Nebraska statute providing that every loaf of bread should be ½ pound, 1 pound, 1½ pounds, or multiples of one pound in weight, and prohibiting loaves of other weights. The court held the law repugnant to the Fourteenth Amendment, for the reason that the provision was not necessary for the protection of purchasers against imposition and fraud by short weights, and was not calculated to effectuate that pur-

pose; that it subjected bakers and sellers of bread to restrictions which were essentially unreasonable and arbitrary, it being determined by the court that unwrapped bread would lose as much as two ounces by evaporation during 24 hours after baking.

This, like the preceding case, was an attempted regulation of a particular business, the right of regulation being suggested in the *Wolff Packing Company* case, *supra.* It may be distinguished from the zoning regulations in like manner.

> *Hadacheck v. Los Angeles,* 239 U. S. 394, and
> *Reinman v. Little Rock,* 237 U. S. 171.

We have already in this brief referred to and analyzed these cases. We do not agree with the interpretation of counsel, that it was found that the maintenance of the particular business was one which was harmful and injurious to the public by reason of obnoxious odors, noise or the dangers which attended the operation of the plant. Quite the contrary, it was held in both of these cases that the police power may be exerted under certain conditions to declare that in particular circumstances and in particular localities specified businesses not nuisances *per se* were nuisances in fact and law. These cases form the basis, we believe, of the principles justifying the right of comprehensive zoning as enunciated in the recent case of *Village of Euclid v. Ambler Realty Co., supra.*

Barbier v. Connolly, 113 U. S. 27, involved an ordinance of the City of San Francisco which contained a prohibition against carrying on the washing and ironing of clothes in public laundries and wash-houses within

certain prescribed limits of the city and county from ten o'clock at night until six o'clock in the morning of the following day. The court held the ordinance a valid regulation and not objectionable because of the fact that it was made enforceable in a special, designated area, and in this respect stated:

> "From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts. * * * Regulations for these purposes may press with more or less weight upon one than upon another. * * * Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment."

This case dealt with an early effort at zoning by the City of San Francisco, and it is difficult to perceive the materiality claimed by counsel in support of their argument. It gave recognition to the basic principle of law in relation to zoning, that no discrimination exists in the creation of various zones for needful regulations pertaining to businesses which operate alike as to all persons and within which all engaged in particular activities are similarly affected.

Soon Hing v. Crowley, 113 U. S. 703, affirmed the rule in Barbier v. Connolly, *supra.*

Cusack v. Chicago, 242 U. S. 529, involved an ordinance of the City of Chicago which made it unlawful to erect billboards in any block upon any public street in which half of the buildings on both sides of the street were used exclusively for residence purposes, without first obtaining the consent in writing of the owners of the majority of the frontage on both sides of the street in the block where the billboard was to be erected. This affected all billboards over twelve feet in area. The court held that the structures were offensive, so as to be the subject of regulation under the exercise of the police power, and distinguished the case from *Eubank v. Richmond,* 226 U. S. 137, in this manner:

> "The ordinance in the case at bar absolutely prohibits the erection of any billboards in the blocks designated, but permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification. The one ordinance (*Eubank case*) permits two-thirds of the lot owners to impose restrictions upon the other property in the block, while the other permits one-half of the lot owners to remove a restriction from the other property owners. This is not a delegation of legislative power, but is, as we have seen, a familiar provision affecting the enforcement of laws and ordinances." (Italics ours.)

St. Louis Posting Company v. St. Louis, 249 U. S. 269. In this case was affirmed the ruling in *Cusack v. Chicago, supra,* that billboards were of such a nature that they could be entirely prohibited by the municipality if it saw fit, and, accordingly, that restrictions imposed upon them under the police power were not subject to

the objection that they were either unreasonable or unconstitutional. One may not complain of a police power regulation as unconstitutional in respect to a business which cannot be conducted as a matter of right and which may be engaged in only by permission of the municipality.

These last mentioned cases, relating as they do to nuisance and non-useful businesses and not to businesses and occupations which may be engaged in as a matter of right, fail in every respect to support the conclusions of counsel that a zoning ordinance prohibiting business in residential districts is an invalid exercise of the police power if such businesses are inoffensive and not of a nuisance nature. The zoning power, as we have already shown, is much broader than the law of nuisances and is not limited to non-useful and nuisance occupations. The power of the sovereign state to regulate those activities which cannot be lawfully engaged in except with its consent is independent of the regulations that may be imposed under the police power out of considerations touching the general prosperity and welfare and is governed by entirely different principles.

Counsel cite and discuss numerous other cases decided by courts in different states, some as an attempted criticism of conclusions sustaining the right to comprehensively zone, others as authority directly opposing the right to zone. Practically all of these cases are cited by this Honorable Court in its decision in the case of *Village of Euclid v. Ambler Realty Co., supra*, without comment, except as indicating not only the general trend of judicial thought upon this subject, but also the majority opinion

in support of the validity of such legislation. Since it must be recognized that there has been a conflict of opinion upon this subject, we do not believe that it would be of value to attempt here to analyze or distinguish the cases relied upon by counsel representing the minority opposing conclusions of a few courts upon this issue, and that to do so would only unnecessarily burden the record.

The Zoning of the Property of Plaintiffs in Error Was Reasonable and Justifiable Under All the Facts and Circumstances, and the Supreme Court of California Did Not Err in So Holding.

Having presented the general argument in support of their attack against the constitutionality of the said zoning ordinance, the argument of counsel now turns upon a question of fact in the alleged improper zoning of the particular property of plaintiffs in error and other property claimed to be similarly situated. In this regard, it is alleged that the ordinance is unreasonable, arbitrary and discriminatory as to plaintiffs in error, and that its enforcement as to them has the effect of denying to them the equal protection of the law. This point of attack involves, in the main, considerations of fact alone.

Besides the matter contained in the pleadings, findings of fact were rendered and filed in the proceeding, as part of the record, by a referee appointed by the Honorable District Court of Appeal, the said findings touching numerous facts relating to the issues. The decision of the state Supreme Court discloses that that tribunal gave the most minute attention and consideration to these facts, particularly as they related to the asserted unrea-

sonableness of the ordinance, and after taking up in detail each particular ground of objection presented by the plaintiffs, that court concluded as follows:

> "These findings of the referee do not in our opinion sustain the contention of the petitioners that the inclusion of that portion of Wilshire boulevard in which their property is situated in Zone "B" was arbitrary, unreasonable and discriminatory. On the contrary, we are satisfied that the Council did take into consideration the character of the boulevard and that its designation of the uses for which property fronting on Wilshire boulevard might be devoted was appropriate and proper." [R. 63.]

The situation thus disclosed by the record presents the strongest grounds conceivable, indicating the legality of this phase of the said zoning ordinance and negativing the assertion of plaintiffs in error that the same was either unreasonable or discriminatory in its application to their property. No suggestion is made that the council did not at all times act in the highest good faith in the zoning of plaintiffs' property. That body, upon the facts before it, exercised its judgment and discretion and determined that plaintiffs' property was appropriately of Zone "B" classification. The highest court of the state has affirmed the correctness of this determination and has clearly shown by the facts that the conclusions of the legislative body were amply justified and bore a real and substantial relationship to the objects and purposes justifying that body in exercising the police power.

Plaintiffs in error now come before this court and ask it to override these conclusions. Their argument in that behalf rests largely, if not altogether, upon their indi-

vidual interpretations and upon disputable constructions and considerations of the findings of fact, differing from that of the legislative body and from the interpretation of the state Supreme Court. This court, we respectfully submit, will not declare unconstitutional or null and void legislative action upon considerations of this character, particularly where its good faith is not questioned and it has acted according to its best judgment under the circumstances. The situation comes squarely within the decision in *Hadacheck v. Los Angeles, supra,* p. 413, where it was stated:

> "In other words, petitioner makes his contention depend upon disputable considerations of classification and upon a comparison of conditions of which there is no means of judicial determination and upon which nevertheless we are expected to reverse legislative action exercised upon matters of which the city has control. * * * It may be that something else than prohibition would have satisfied the conditions. Of this, however, we have no means of determining, and besides we cannot declare invalid the exertion of a power which the city undoubtedly has because of a charge that it does not exactly accommodate the conditions or that some other exercise would have been better or less harsh. We must accord good faith to the city in the absence of a clear showing to the contrary and an honest exercise of judgment upon the circumstances which induced its action."

Presented as a concrete, legal proposition, we take it that the position of counsel is, that the action of the legislative body, considered in the light of all the facts and circumstances as disclosed by the pleadings and the

findings of the referee, as well as those presumed in law to have been considered by that body, had so little valid, substantial or other relation to the public health, safety, morals, or to the general welfare, that it can be said as a matter of law that the conclusion of that body as to the zoning of plaintiffs' property was error and beyond the scope of the police power. This position cannot be sustained. The facts abundantly justify the action of the legislative body, and the decision of the State Supreme Court in affirming its action is sustained by its sound and unquestioned reasoning. We take it that this Honorable Court will not interfere unless the situation was so gross and extreme as to justify the conclusion that the action of the legislative body had no real or substantial relation to the public health, safety, morals, or to the general welfare; for in a similar case (*Cusack v. Chicago, supra*), pp. 530, 531, this court said:

> "We therefore content ourselves with saying that while this court has refrained from any attempt to define with precision the limits of the police power, yet its disposition is to favor the validity of laws relating to matters completely within the territory of the state enacting them, and it so reluctantly disagrees with the local legislative authority, primarily the judge of the public welfare, especially when its action is approved by the highest court of the state whose people are directly concerned, that it will interfere with the action of such authority only when it is plain and palpable that it has no real or substantial relation to the public health, safety, morals, or to the general welfare."
>
> Citing *Jacobson v. Massachusetts*, 197 U. S. 11, 30.

Six grounds are specified by plaintiffs in support of their claim of error in the conclusions of the State Supreme Court upon this issue, and it is asserted that these six grounds establish the unreasonableness of the legislation in question. These touch upon varying phases of the facts. Counsel have presented a summary of facts largely in narrative form which, after an examination thereof, we do not regard as sufficient for the purpose of considering this issue.

Besides the record before it, containing the findings in toto, the State Supreme Court made a lengthy recital in its decision of the facts exactly as contained in the findings. An accurate and detailed summary of the facts, therefore, can be presented by excerpts from said decision, supplemented by additional excerpts from the findings as contained in the record. In said decision it is stated:

> "A consideration of the findings of the referee in the instant case is necessary to a determination of the second contention of the petitioners; i. e., that the particular ordinance in controversy is so unreasonable and discriminatory as to be beyond the purview of the police power.
>
> "The findings of the referee relative to the situation of the petitioners' property and the conditions existing upon Wilshire boulevard and the territory adjacent thereto are as follows:
>
> 'That at the time of the adoption and approval of each and all of the ordinances hereinbefore referred to and at the present time, the aforesaid Wilshire boulevard was and is a main thoroughfare extending through a portion of the City of Los Angeles to and through a large portion of the county of

Los Angeles, and from there to other cities and municipalities, and to the Pacific Ocean in the City of Santa Monica; that said boulevard was and is a main artery for a tremendous amount of automobile and vehicular traffic between the said City of Los Angeles and said other communities; that at all hours of the day and during most of the hours of the night, said boulevard is filled with traffic of every description, including automobile trucks and other vehicles engaged in commerce between said communities, and engaged in other commercial activities. That said Wilshire boulevard is one of the main arteries of travel of the City of Los Angeles. That said automobile traffic creates a great deal of noise, confusion and congestion along said Wilshire boulevard where the property of petitioners is situated and for long distances in either direction from said property. That there is not located along Wilshire boulevard within one mile in either direction from said property any dwelling house, tenement, hotel, lodging or boarding house, church, private club, public or semi-public institution of any kind, railroad station or other structore or improvement permissible under B zone, except that there is located on a lot on Wilshire boulevard near said property an old farm house. That there are several real estate offices located along Wilshire boulevard near said property; that on the southeast corner of Cochran avenue and Wilshire boulevard across the street from the property of the petitioners there is a brick store building which at the time of passage of said zoning ordinance was occupied by a grocery store and a market; that on the south side of Wilshire boulevard at the corner of Wilshire and Mansfield avenue, six blocks east of the property of petitioners, there was at said time located a fruit stand;

that at the intersection of LaBrea street and Wilshire boulevard there is located a two-story brick business block; on the southeast corner of Wilshire and LaBrea there is located a real estate office; that on the northeast corner of Wilshire and LaBrea streets there is located an oil station with a real estate office adjoining; that on the property of petitioners there is located a real estate office. That all of said buildings above referred to were located on said property at the time said zoning ordinance went into effect, except the brick building on the southwest corner of Wilshire and LaBrea.

'That the property of the petitioners described in paragraph II of said petition would have a market value of from 100 per cent to 200 per cent greater than it now has if said property could be used for business purposes.

'That as to the property, fronting on said Wilshire boulevard which is restricted against use for business purposes by deed, the effect of placing property of petitioners and other property unrestricted by deed along Wilshire boulevard in Zone C would be to depreciate the market value of said property so long as said deed restrictions should remain in effect.

'That under the provisions of said ordinance, the property fronting on said Wilshire boulevard, at the intersection of what is known as LaBrea avenue and on either side thereof for a distance of one block, has been selected, designated and placed within what in said ordinance is referred to as a "C Zone" district, wherein may be constructed buildings and structures for business purposes; that the property of the said petitioners is located in a tract which adjoins said property so placed, as aforesaid

in said C zone. That said LaBrea avenue has been dedicated as a through street from Hollywood on the north to several miles south of Wilshire boulevard. That said LaBrea avenue is improved from Hollywood on the north to three or four blocks south of Wilshire boulevard on the south, with a paved street, said pavement being about three or four miles long; and that southerly from said point said street was, at that time of the passage of the said zoning ordinance, dedicated, but that no improvement had been made thereon and that said street was at said time impassable, that the property fronting on LaBrea avenue to the north of Wilshire boulevard for a distance of approximately two miles is almost entirely unimproved and undeveloped, and that Pico street is a street in the City of Los Angeles running east and west approximately a mile south of Wilshire boulevard; that the property fronting on LaBrea street from Wilshire boulevard to Pico boulevard is entirely unimproved and undeveloped.

'That the property of said petitioners is as well adapted to business purposes and uses as is said other property along La Brea street.

'That except for a few real estate offices, none of the buildings on said Wilshire boulevard within a mile in either direction from the property of the said petitioners are set back from the street line of said Wilshire boulevard.

'That petitioners have taken every step and means provided in said ordinance and within their power under the laws of the ordinances of the City of Los Angeles to obtain relief from the legislative body of the said City of Los Angeles, and have heretofore filed an application with the City Council of said

city calling the attention of said City Council to the conditions existing upon said boulevard as herein set forth, and requesting that the said City Council, pursuant to section 4 of said ordinance, declare an exception to the restrictions of said ordinance with respect to the property of said petitioners, and to, pursuant to the provisions of said section 4 of said ordinance, adopt an ordinance permitting the construction and erection of a business building which the said petitioners propose to construct and erect upon their property; that said City Council, at a regular meeting thereof held on the 19th day of July, 1923, acted upon the said request of said petitioners, by unanimously adopting the report of the Public Welfare Committee of the council relative to said request, which said report is as follows: (The referee's report here quotes said committee report, which closed as follows: "Your committee desires to state that we believe that Wilshire boulevard is destined to become a show street when widened and beautified as contemplated and the encroachment of business upon this boulevard is at this time unnecessary and would be a great detriment to the future residential development of this thoroughfare and we therefore recommend that the request be denied and filed.")

'That prior to the adoption of said Ordinance No. 44,668, New Series, by which ordinance section 2-a-56 was added to said Ordinance No. 42,666, New Series, as aforesaid, making the district in which the petitioners' property is located a part of B zone of said city, the said district where said property is located had not been zoned and no restrictions by law had been established preventing said property from being used for business purposes; that before the adoption of said Ordinance No. 44,668, New

Series, as aforesaid, the City Planning Commission of the City of Los Angeles had drafted a map and had recommended to the said City Council of said city the adoption of said map as Part No. 7 of the zone map of said city by which said property of the said petitioners and property in that vicinity was shown to be restricted against use for business; that thereupon, to-wit, on the 5th day of August, 1922, the petitioners herein and other property owners petitioned the said City Council protesting against the placing of said property fronting on said Wilshire boulevard in Zone B; that on the 7th day of August, 1922, the said City Council of said city, at a regular meeting, considered the protest of said petitioners and others, and thereupon the following proceedings were had; * * *' (The referee's report here sets forth those proceedings, wherein the City council sustained the protest and voted to place in Zone C the property fronting on Wilshire boulevard, from LaBrea avenue to westerly city limits. But the referee's report further shows that thereafter the City Council received certain communications from citizens protesting against the placing of said territory in Zone C; that on the seventeenth day of August, 1922, after considering said protests, the City Council reconsidered its action of August 7th.)

"The referee further finds:

'That Pico street is a street in the City of Los Angeles running east and west and traversing said city for almost its entire length and running westerly through the City of Los Angeles and a part of the county of Los Angeles, to the Pacific Ocean. That said Pico street has a double track street car line almost to Rimpau boulevard. That said Pico street is improved with pavement for practically its entire length, to the ocean, and is also a street on

which there is a great deal of automobile traffic, but that the automobile traffic on said Pico street is not as heavy as on said Wilshire boulevard. That said Pico street and the property abutting thereon for a considerable distance west of Rimpau boulevard is lower in elevation than said Wilshire boulevard and the property abutting thereon. That west of Rimpau boulevard there are fewer business houses and more residences fronting on Pico street than there are fronting on Wilshire boulevard. That included in the term "business houses" on both Pico street and Wilshire boulevard are real estate offices. That said Pico street for its entire length inside the City of Los Angeles has been placed in Zone C. That said Pico street easterly from said Rimpau boulevard is well built up with business houses.

'That Wilshire boulevard easterly from Rimpau for a distance of approximately three miles was originally built up with high class residences. That before the adoption of said zoning ordinance a number of these residences had been converted into restaurants, lodging houses and tea rooms. That there are on said Wilshire boulevard in the course of construction at the present time easterly of said Rimpau boulevard four or five large apartment houses; that the Ambassador Hotel occupies a tract of land fronting on said Wilshire boulevard about two miles east of Rimpau boulevard, and that there are located in said Ambassador Hotel various shops and merchandising establishments; that said hotel is located several hundred feet south of said Wilshire boulevard. That on the corner of Wilshire boulevard and Vermont avenue, a distance of approximately two miles east of said Rimpau boulevard, there is now in course of construction a large business block. That

at the intersection of Wilshire boulevard and Western avenue, a distance of about one mile east of said Rimpau boulevard, there are one brick business building and two real estate offices. That Western avenue and Vermont avenue aforesaid have been placed in Zone C; that Cochran avenue on which the property of petitioners abuts is, southerly from Wilshire boulevard, a paved and well traveled street, and that said Cochran avenue does not extend north of said Wilshire boulevard. That there is no car line on Wilshire boulevard for its entire length.

'That both Pico boulevard and Wilshire boulevard westerly from Rimpau avenue traverse sections of the City of Los Angeles which at this time are but sparsely built up and inhabited, but which are in the course of rapid upbuilding and development. That within the last two years throughout the City of Los Angeles there has been a large amount of development and building, of all kinds.

'That all the property covered by Part No. 7 of the Zone Map and the extension thereof to the city limits of the City of Los Angeles, so far as the same has been subdivided is in the course of an extremely rapid development, and that a great many residence buildings have been and are now being erected thereon, except as hereinabove in these findings stated.

'That there is in the City of Los Angeles a department of the city known as the City Planning Commission and that G. Gordon Whitnall is and has been since the creation of said commission in 1920 the secretary consultant of said commission; that immediately upon its creation said City Planning Commission undertook a study of the entire

City of Los Angeles, district by district, for the purpose of enacting a comprehensive zoning plan throughout the said city. That in each district hearings were had and the proposed zone map was posted and public hearings had; that thereafter each of said maps was considered by said City Planning Commission and presented to the City Council with the recommendation of City Planning Commission; that thereafter the council adopted the ordinances covering the zoning of property in said City of Los Angeles, covering the districts included in said maps; that the zoning maps covering the property in question in this action were prepared and adopted and presented to the council by the said City Planning Commission, pursuant to the above plan; that the proceedings before the City Council with respect to the zoning of the property involved in this action are such as have been heretofore in these findings set forth in full.'" [R. 57-63.]

In addition to the above facts recited by the court, the findings of the referee disclose that at the time the tract of land in which the property of plaintiffs in error is located was subdivided, filed for record and placed upon the market for sale, that portion thereof fronting on said Wilshire boulevard was offered for sale in the open market as property upon which buildings might be constructed and erected for the purpose of conducting therein stores, mercantile establishments and business shops of various kinds, and that *all of the said property in said tract fronting on Wilshire boulevard, with the exception of the property described in paragraph II of said petition* (which is the property of plaintiffs in error) *was sold as business property.* [R. 43.]

Also, the referee found in detail:

"That at or about the time said tract was subdivided and sold and prior to said property becoming a part of the City of Los Angeles, property on the south side of Wilshire Boulevard two and a half blocks east of La Brea street and one and one half blocks west of La Brea street was subdivided and sold without restrictions as to its use for business purposes; and that at or about the same time property on the south side of Wilshire boulevard adjoining the property subdivided and sold by petitioners and running west five blocks and to approximately 100 feet west of the intersection of Wilshire boulevard and Genesee street, was also subdivided and placed on the market for sale without any restrictions against the use of said property for business purposes.

"That commencing two and a half blocks east of La Brea street and running easterly seven blocks to Rimpau boulevard all the property on the south side of Wilshire boulevard has been subdivided and placed on the market for sale, with restrictions of record against the use of said property for business purposes.

"That to the west of Genesee street (which lies 11 blocks west of La Brea street) and running thence west five blocks to Fairfax avenue, all the property on the south side of Wilshire boulevard has been subdivided and placed on the market for sale, with restrictions of record prohibiting the use of said property for business purposes.

"That commencing at Fairfax avenue aforesaid and running westerly therefrom to the city limits of the City of Los Angeles, there is a tract of land on the south side of Wilshire Boulevard known as Carthay Center, and that all of said property fronting on the south side of Wilshire boulevard has been subdivided and placed on the market for sale, with restrictions of record prohibiting the use of said property for business purposes.

"In other words, commencing with Rimpau boulevard on the east and running west there are seven and a half blocks on the south side of Wilshire boulevard with restrictions of record against use for business purposes; that running thence west fourteen blocks the property on the south side of Wilshire is unrestricted for business purposes, and that running west from said unrestricted territory to the city limits of the City of Los Angeles a distance of over one mile all the property on the south side of Wilshire boulevard is restricted against business houses.

"That on the north side of Wilshire boulevard running west from Rimpau boulevard to within a block of La Brea street all the property fronting on Wilshire boulevard has been subdivided and placed on the market for sale, with restrictions of record prohibiting its use for business purposes.

"That from the westerly boundary line of the aforesaid property, running westerly to the city limits of the city of Los Angeles the property is unsubdivided, excepting two blocks on the northeast and northwest corners of Wilshire boulevard and La Brea street. That none of the last mentioned property running west from a block east of La Brea street to the city limits of the city of Los Angeles, a distance of approximately two miles and a quarter, has any restrictions of record whatsoever, all of said property being unsubdivided. That since the filing of the petition herein the property on both sides of said Wilshire boulevard running westerly from Genesee street to the city limits of the city of Los Angeles, a distance of approximately one mile, has been, by ordinance of the said City of Los Angeles, placed in Zone B." [R. 43-45.]

It is charged in the first of these assignments that the ordinance is unreasonable because the council, in placing

the property of plaintiffs in error and adjacent property in Zone B, disregarded the obvious and known facts that the property had been subdivided and sold as business property and to some extent, at least, improved for business purposes; hence, that the character of the property was changed by prohibiting its use for the purposes for which it was originally intended. It is also alleged that the State Supreme Court overlooked these circumstances because, as counsel state, they find no reference in the opinion to the fact that the property in question had acquired a fixed status as business property.

The conclusion of the State Supreme Court, that the council of the City of Los Angeles, in enacting said ordinance, did take into consideration the character of said boulevard and that its designation of the uses for which property fronting on Wilshire boulevard might be devoted was appropriate and proper, is of itself, we submit, a sufficient denial of counsels' assertion that the said court did not consider all the circumstances before the council, and sufficiently disproves the argument of counsel that the property had acquired a fixed status as business property.

The argument of counsel goes to this extent, that the facts and circumstances were such that the legislative body of the municipality could not have done other than to place the said property in Zone C without abusing its discretion and committing manifest error.

Clearly, this position cannot be sustained. There is no evidence that that body disregarded any of the facts pertaining to the property of plaintiffs in error, or that it failed in any respect to give attention to the matters

of which plaintiffs in error speak. This is only a bold assumption on their part. In the absence of such evidence, it must be presumed that the council took into consideration every fact and circumstance pertaining to this property and other property within the zone necessary to be considered in relation to the exercise of its judgment.

> "It is, of course, primarily for the legislative body clothed with this power to determine when such regulations are essential, and its determination in this regard, in view of its better knowledge of all the circumstances and the presumption that it is acting with a due regard for the rights of all parties, will not be disturbed in the courts, unless it can plainly be seen that the regulation has no relation to the ends above stated, but is a clear invasion of personal or property rights under the guise of police regulation." Citing "*Ex parte Quong Wo*, 161 Cal. 220."
>
> *Ex Parte Hadacheck*, 165 Cal. 416, 419.

However, the facts themselves do not support the statement of counsel that the property of plaintiffs in error, and even other property in said tract, had acquired a fixed status as business property, even assuming that the discretion of the legislative body might have been controlled by this consideration, and no such conclusion could have been drawn from the facts by the Supreme Court of California.

The record discloses that the property of plaintiffs in error was not sold at any time for business property. [R. 43.] Other property in the tract facing on Wilshire boulevard had been sold as property upon which business buildings might be constructed. [R. 43.] It was equally

free for uses of other character. At the time of the enactment of the said zoning Ordinance No. 44668 (New Series), creating said Zone "B," neither the property of plaintiffs in error nor other property in the tract facing on Wilshire boulevard contained any structures whatever, and such property was vacant and unoccupied. This was the condition of practically all other lots facing on Wilshire boulevard for a mile or more westerly of the property of plaintiffs in error, to the westerly boundary of the city, and easterly thereof for a mile or more. [R. 46.]

The record further discloses that with the exception of certain business structures upon the intersecting corners of Wilshire boulevard and La Brea street, which by the said zoning ordinance are all within Zone "C," the business zone, the only structures which might be regarded as of a business character, within one mile in either direction from the property of plaintiffs in error, were several real estate offices, a one-story brick store building on the southeast corner of Cochran avenue and Wilshire boulevard, a fruit stand on the corner of Wilshire and Mansfield avenue, and a real estate office on the property of plaintiffs in error [R. 46.] Thus, within a distance of two miles, and on property placed by said ordinance in Zone B, there existed five structures used for business. The property of plaintiffs in error contained one of these structures, a real estate office, but it appears by the record [R. 43] that the tract of which this lot was a part was subdivided by plaintiff in error A. W. Ross, and of the lots in said tract facing on Wilshire boulevard none had been in any manner built upon or otherwise devoted to business purposes.

It also appears that much of the property along Wilshire boulevard, placed in Zone "B" by said ordinance, had already been restricted against use for business purposes by deed restrictions. This was true of seven blocks beginning two and one-half blocks east of La Brea street on the south side of Wilshire boulevard. Likewise, of the five blocks on the south side of Wilshire boulevard, beginning at Genesee street (which lies eleven blocks westerly of La Brea street) and extending westerly to Fairfax avenue, and of all the remaining property on the south side of Wilshire boulevard extending from Fairfax avenue westerly to the city boundary, constituting the entire frontage of Carthay Center [R. 44], many blocks in extent; also of all the frontage along the north side of Wilshire boulevard from Rimpau boulevard to within a block of La Brea street [R. 44], approximately nine blocks in extent. The remaining property facing on the northerly side of Wilshire boulevard, beginning a block west of said La Brea street to the city limits of the City of Los Angeles, a distance of approximately two and one-quarter miles, was at the time of the enactment of said zoning ordinance unsubdivided [R. 44], and consequently was in acreage, vacant and undeveloped. Thus the facts are that the property of these plaintiffs, and the lands contiguous thereto, and practically all other property fronting on this portion of Wilshire boulevard for many miles was unimproved and undeveloped at the time the zoning ordinance became effective.

In the face of these undisputed facts in the record, counsel give expression without qualification to these statements:

"That after becoming a part of the City of Los Angeles it (property of plaintiffs in error and other property adjacent thereto) remained business property, and the only development was for business uses and purposes during a period of nearly a year which elapsed before the adoption of these ordinances."

That "the only kind of structures (and there are a considerable number) are those of a business nature which were erected before the property was placed in 'B' Zone, and all the development that has been made in this vicinity has been for uses permissible under 'C' Zone, and since the prohibitions of 'B' Zone have been applicable, all the property has remained static and frozen."

That it was "the obvious and known fact that the property had been business property subdivided and sold as such, and to some extent at least, improved for business purposes."

And "that the property in question, as well as other property, had in the manner aforesaid acquired a fixed status as business property." (Pltffs. Br. pp. 94-96.)

These statements, or rather conclusions, are absolutely unwarranted. Because of the fact alone that the major part of the frontage along Wilshire boulevard for a mile on either side of the property of plaintiffs in error had been restricted against business uses by voluntary act of the owners and subdividers, it would be difficult for the council to arrive at any other conclusion regarding the zoning of the property of plaintiffs in error than that revealed by the ordinance.

Counsel suggest, if they do not openly assert, that the council was required to zone this property to "C" Zone uses, because other Wilshire frontage in the tract had

been sold by plaintiffs in error without restrictions for use as business property. It is a novel suggestion that the powers of government may be thus limited or destroyed. It is well established that everyone holds his property subject to the police power of government which may give expression to that power whenever the circumstances require or justify it.

As was said by this court in the case of *Atlantic Coast Line Ry. v. City of Goldsboro,* 232 U. S. 548:

> "For it is settled that neither the 'contract' clause nor the 'due process' clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise."

Citing:

> "Slaughter-House Cases, 16 Wall. 36, 62;
> Munn v. Illinois, 94 U. S. 113, 125;
> Beer Co. v. Massachusetts, 97 U. S. 25, 33;
> Mugler v. Kansas, 123 U. S. 623, 665;
> Crowley v. Christensen, 137 U. S. 86, 89;
> New York &c Ry. Co. v. Bristol, 151 U. S. 556, 567;
> Texas &c Ry. Co. v. Miller, 221 U. S. 408, 414, 415."

> "And the enforcement of uncompensated obedience to a regulation established under this power for the public health or safety is not an unconstitutional taking of property without compensation or without due process of law."

Citing:

> "Chicago, Burlington & Q. Ry. v. Chicago, 166 U. S. 226, 255;
> New Orleans Gas. Co. v. Drainage Commissioners, 197 U. S. 453, 462;
> C. B. & Q. Ry. v. Drainage Commissioners, 200 U. S. 561, 591, 592."

To the same effect, it was stated in *Ex Parte Hadacheck*, 165 Cal. 416, 420:

> "The right of the Legislature, in the exercise of the police power to regulate or in proper cases to prohibit the conduct of a given business is not limited by the fact that the value of the investments made in the business prior to any legislative action will be greatly diminished." Cited cases.

The second assignment is that the ordinance is unreasonable in that it disregards traffic conditions.

In advancing this point counsel assume that because Wilshire boulevard is shown by the findings to be a main artery for a large amount of automobile traffic, the property of plaintiffs in error and other property along said boulevard is more desirable for "C" zone uses than for "B" zone uses, and the legislative body is compelled by this circumstance to classify it only as "C" zone property. This argument leads nowhere in assailing the ordinance as unreasonable. The right to exercise the police power does not rest upon comparative uses. To repeat again from *Hadacheck v. Los Angeles, supra,* "Petitioner makes his contention depend upon disputable considerations of which there is no means of judicial determination." To argue that because of traffic the said property is more desirable for business than for resi-

dential or multiple residential uses, is at least an admission that it is desirable for "B" zone uses. Zoning does not attempt, necessarily, to zone property to the most "desirable" uses. It does undertake to restrict property to those uses which in view of the locality and under all the circumstances best comport and have the most substantial relationship to the public peace, safety, health, morals and general welfare.

This was the nature of the argument advanced in *Hadacheck v. Los Angeles, supra.* In that case the facts disclosed that it was more desirable for Hadacheck to burn brick at the site of the clay deposit than elsewhere, and for him that site was much more attractive and useful.

The discretion, however, of determining the nature of the permissive uses in particular zones is a legislative matter resting with the council, which cannot be disturbed merely by showing that the property could be used more advantageously or more profitably by the owner for some other purpose.

To assert that the property is more desirable for business because the boulevard is a main artery and the existence of traffic thereon, is, we submit, a false assumption, and the fact does not establish the truth of the conclusion.

The Supreme Court of California carefully considered this point and it was not in error in thus ruling:

"True, the finding of the referee is that Wilshire boulevard is 'a main thoroughfare extending through a portion of the City of Los Angeles to and through large portions of the county of Los Angeles, and from there to other cities and municipalities, and to the Pacific

Ocean in the city of Santa Monica' and is 'a main artery for a tremendous amount of automobile and vehicular traffic between the said City of Los Angeles and said other communities.' This is not necessarily proof that the boulevard is fit only for business. The requirements of a traffic boulevard are that traffic shall be kept moving, whereas it is common knowledge that on business streets traffic is retarded. This naturally arises from the necessity of stopping and parking on business streets. The inevitable result would be that if Wilshire boulevard should become a business street, it would lose much of its usefulness as a main artery for traffic between Los Angeles and the neighboring cities and municipalities. The fact that there is a large volume of traffic upon Wilshire boulevard which necessarily must be productive of incidental noise and confusion is not conclusive that said boulevard is clearly unadapted to use for residential purposes of the character contemplated in Zone 'B.' The circumstance that many very large and expensive apartment houses have already been constructed upon this boulevard is in itself substantial evidence that the boulevard is not unadapted to use for such purposes." [R. 64.]

The third ground upon which the ordinance is assailed as unreasonable is that the owners of this property have not constructed any buildings of the class permitted by the ordinance, from which counsel deduce that such property is not adapted for the purposes permitted.

The argument presented upon this point is impressive for its flagrant disregard of the record. The zoning ordinance affecting the property of plaintiffs in error was enacted September 21, 1922, and did not become effective until the map adopted in connection with the ordinance was placed of record, December 21, 1922. The petition for the writ of *mandamus* was filed August 7, 1923,

less than eight months thereafter. The findings of the referee were properly confined to facts and circumstances at and prior to the time of the filing of this petition. Ignoring the facts contained in the record, which alone can be considered in this proceeding, counsel launch into a series of unproven and voluntary statements respecting alleged conditions along Wilshire boulevard westerly of Rimpau street, entirely outside of the findings and covering a period of time to the present, with a view of showing that said property has been improperly zoned because structures permitted by the ordinance had not been erected thereon.

By way of illustration we cite these statements:

"None were constructed prior to the adoption of this ordinance; none have been built since it went into effect, and aside from previously built business places every foot of property, for that entire distance, has been allowed to stand idle, covered only with weeds, real estate signs and billboards." (Pltffs. Br., p. 99.)

And, again, we find this unsupported statement:

"The appearance of Wilshire boulevard at the present time, throughout this territory, is that of a lane flanked by vacant land, while to the north and to the south and completely surrounding it, the territory has been and is being built up with startling rapidity." (p. 100.)

And not satisfied with this flagrant disregard of the record, counsel proceed in this manner:

"Why is it that the only business houses constructed before the provisions of this ordinance put a stop to further development, lie upon the property fronting on Wilshire boulevard in this section? Why is it that the only building of any character since its adoption has been

within the favored district at La Brea, where the property has been placed in Zone C, and open to business construction? Why is it that every other street in the City of Los Angeles, no matter how remotely located or poorly improved as a passable highway, has had its share of development? The reason is obvious, and every man, woman and child in the City of Los Angeles knows it." (p. 100.)

Assertions of this character, replete with unproven and irrational statements uttered by counsel with little or no attention to the record, present a false conception of the cause to the court and do a great injustice.

Apparently appreciating the fact that their argument and statements therein expressed do violence to the record, counsel attempt to overcome the manifest contradiction by stating that:

"It is true that some of the property lying away from the property of plaintiffs in error has been restricted by deed to residential use for a period of time. These restrictions were placed there years ago by the original subdividers, when it was thought that the residential development then existent in the older sections of Wilshire boulevard would continue." (Ptffs. Br., p. 101.)

The facts herein summarized fully indicate the extent to which property along said boulevard has been thus voluntarily restricted against business by property owners and subdividers, and that at the time of the enactment of said ordinance, a very large part of said frontage was privately restricted in this manner. This factor is material as showing that the judgment of the council was not amiss, because it accorded with the voluntary action of the land owners themselves, the zoning regulations being imposed but a short time after the private

restrictions. Of what import or materiality then is the statement of counsel that "These restrictions were placed there years ago by the original subdividers, when it was thought that the residential development then existent in the older sections of Wilshire boulevard would continue?" Another disregard of the record in attempting a comparison between present conditions (of which there is no record or information) and conditions maintaining years ago. The record does not disclose the dates when the restrictions above referred to were created, but counsel will not question that it was shortly prior to the enactment of the zoning ordinance.

It is an elementary rule of procedure that conclusions of the Supreme Court of California cannot be assailed as incorrect or error by voluntary and unsupported statements of counsel outside of the record, and that the record alone must afford the basis of testing the judgment of the state court.

To further extend this argument appears to us to be a waste of time. The fact that particular property might be used profitably for general business purposes does not sustain the conclusion that the ordinance was unreasonable in restricting its use for residential purposes, and the fact must not be overlooked that apartments, hotels, and other multiple residential uses permitted in Zone "B," in which this property has been placed, are quasi-business and strictly income uses.

The zoning ordinance being of a comprehensive nature, its restrictions are imposed, as the Supreme Court of California stated, for "the purpose of directing the present and future development of the city." It is, however, subject to amendment, and if changing conditions

or circumstances should require a modification of the restrictions or indicate the impropriety of those already imposed, it must be presumed that the legislative body of the city will take these matters into consideration and enact such legislation as under all the circumstances should be necessary. This fact was recognized in *Miller v. Board of Public Works, supra*, p. 496, where the court said:

> "Of course, a comprehensive zoning plan should contemplate and provide for the planning from time to time of the execution of further details, extensions, and such modifications of existing features as unforeseen changes, occurring in the civic conditions, make necessary to the perfection and perpetuation of the plan."

Under the fourth assignment, it is argued that the findings of the referee show that the property of plaintiffs in error has been depreciated in its market value from 100% to 200% by reason of its having been placed in Zone B instead of Zone C.

This point was likewise urged in *Village of Euclid v. Ambler Realty Co., supra.*

The basis of the argument as advanced by counsel is that the ordinance has not suitably given regard to property values and the conservation thereof, conformable with the provisions of the State Enabling Act (Stats. 1917, p. 1419), and because of that fact it is unreasonable. We do not, in any event, rely upon this act. The City of Los Angeles derives its police power from its charter, having taken to itself such authority under the constitutional sanction of the state.

It is argued that the public welfare cannot be subserved by an ordinance which depreciates property 100% to 200% and that such ordinance benefits no one save only the favored few who under the ordinance enjoy a monopoly of business property in that locality. This is a further example of the irrational and intemperate statements of counsel which do violence to the record in the proceeding.

Regulations imposed under the police power frequently have the effect of lessening the value of property. We have already illustrated this by the height limit ordinance of the City of Los Angeles. Many other instances could be cited. But the fact should not be lost sight of, that business uses in residential districts, though enhancing the value of the particular lot so used for business, frequently depreciates to a far greater extent surrounding residential property. The referee in the instant case found "That as to the property fronting on said Wilshire boulevard which is restricted against use for business purposes by deed, the effect of placing property of petitioners and other property unrestricted by deed along Wilshire boulevard in Zone 'C,' would be to depreciate the market value of said property so long as such deed restrictions should remain in effect." [R. 59.]

The conclusion of the Supreme Court of California upon this point, in the instant case, conformed with established law and no error was committed. Said court stated:

"The fact that the inclusion of the petitioners' property in Zone 'B' rather than in Zone 'C' depreciates its value is not of controlling significance. Every exercise

of the police power is apt to affect adversely the property interest of somebody. (Spector v. Building Inspector of Milton (Mass.), 145 N. E. 265, 267.) The provisions of the Enabling Act concerning the conservation of property values have reference to the property value in the district as a whole and not to any particular piece of property. It is to be noted in this behalf that the finding of the referee is that the value of other property along Wilshire boulevard which has been restricted against uses for business purposes by deed will be depreciated if the tract of land in which petitioners' property is located be included in Zone 'C.'" [R. 67.]

The plaintiffs in error certainly cannot be heard to complain on the theory of an uncompensated burden. No business existed on their lands and these properties were in a situation similar to practically all other lands for long distances easterly and westerly thereof. Even in the case of *Hadacheck v. Los Angeles, supra,* p. 408, where the ordinance was retroactive and the police power was exerted to entirely prohibit and suppress the business in the particular locality, this court, as we have already had occasion to point out, said:

> "The court considered the business one which could be regulated and that regulation was not precluded by the fact 'that the value of investments made in the business prior to any legislative action will be greatly diminished,' and that no complaint could be based upon the fact that petitioner had been carrying on the trade in that locality for a long period."

We treat the grounds constituting the fifth and sixth objections in conjunction, since their subject matter is so closely related as to make it impracticable to make a distinction in the argument.

Under the fifth assignment, counsel allege that "The development of other property to business in the immediate vicinity of the property of plaintiffs in error creates a condition whereby it will be impossible for this property ever to become desirable residential property of any character." (Ptffs, Br. p. 104.)

Under the sixth assignment, counsel allege that "The ordinance is further unreasonable in that it zones property against use for business when such property is located in a territory not only better adapted for business and wholly unadapted for residences, but the increasing development of which shows a direct trend toward business." (Ptffs. Br., p. 106.)

The fifth assignment is at most a prediction on the part of counsel, and judged in the light of the findings of fact in the record, is an ill-considered and extravagant one.

The sixth assignment is but a repetition of many like statements contained in the preceding argument in the brief.

Disregarding for a moment the jurisdiction of the council to determine the zone in which should be included the property of plaintiffs in error, and the nature of the restrictions effective therein, we say that the facts and circumstances as disclosed by the record fully justify the action of the legislative body and directly disprove the statements of counsel. There is no support in the findings of fact contained in the record for the statement that "the immediate contiguity of business to plaintiffs' property * * * makes plaintiffs' property wholly undesirable for any purpose except business." Or for the statement that "business structures in immediate proximity to and on both sides of petitioners' prop-

erty * * * maintained and operated for business uses under the very authority of this zoning ordinance, has most conclusively blighted the use of petitioners' property for residential purposes, and by the continuance of such existing establishments has definitely and forever placed the stamp of business use upon this property." Or for the statement that "The adoption of this ordinance arrested Wilshire boulevard almost at the start of its business development so that as a consequence it still remains, by reason of the legislative restrictions, largely unoccupied territory, but not before it began to show clear and unmistakable evidence of a distinct business development." (Br. pp. 104-107.)

These broad conclusions are made by counsel with little or no reference to the record. It will be noted in the record that Rimpau avenue intersecting Wilshire boulevard [R. 52] was treated by the referee as marking the westerly limit of the built-up portion of Wilshire boulevard at the time of the adoption of said zoning ordinance. The findings state

"That both Pico boulevard and Wilshire boulevard westerly from Rimpau avenue traverse sections of the City of Los Angeles which at this time are but sparsely built up and inhabited, but which are in the course of rapid upbuilding and development. That within the last two years throughout the City of Los Angeles there has been a large amount of development and building of all kinds." [R. pp. 62-63.]

The frontage along Wilshire boulevard westerly of Rimpau avenue, above referred to, was included in part within the area which had been shortly prior thereto and on February 28, 1922, annexed to the City of Los Angeles. [R. 45.] The distance from Rimpau avenue

to the west city boundary, it will be recalled, was approximately three miles in extent. [R. 43-44.] In regard to this portion of Wilshire boulevard the findings recite:

"That there is not located along Wilshire boulevard within one mile in either direction from said property any dwelling house, tenement, hotel, lodging or boarding house, church, private club, public or semi-public institution of any kind, railroad station or other structure or improvement permissible under B zone, except that there is located on a lot on Wilshire boulevard near said property an old farm house. That there are several real estate offices located along Wilshire boulevard near said property; that on the southeast corner of Cochran avenue and Wilshire boulevard across the street from the property of the petitioners there is a brick store building which at the time of the passage of said zoning ordinance was occupied by a grocery store and market; that on the south side of Wilshire boulevard at the corner of Wilshire and Mansfield avenue, six blocks east of the property of petitioners, there was at said time located a fruit stand." [R. 46.]

The findings disclose no other business occupation of any of the property placed in Zone "B" along Wilshire boulevard westerly of Rimpau avenue. Thus that portion of Wilshire boulevard, approximately three miles in extent, placed by the council in B zone, contained at the time of the enactment of the ordinance, in widely separated locations, several real estate offices, one store building and one fruit stand. On plaintiffs' property is located one of these real estate offices. [R. 46.] The store building is across the street from the property of plaintiffs in error, then there is a total absence of business structures for six blocks, then the small fruit

stand referred to. Yet, in addition to the broad conclusions hereinbefore related, counsel upon findings of this character, the import and meaning of which are too direct and simple to be subject to misunderstanding, proceed in this manner:

"There are also in the immediate vicinity many real estate offices."

And again:

"That business structures in immediate proximity to and on both sides of petitioners' property * * * have most conclusively blighted the use of petitioners' property for residential purposes * * * and forever placed the stamp of business use upon this property."

And finally that

"Within the area from Rimpau avenue to the city limits, there were at the time of the adoption of this ordinance nothing but business houses upon Wilshire boulevard." (Ptffs. Br., pp. 104-106.)

These statements and conclusions are without support and wholly unwarranted, as is also the general deduction that the frontage in question was so definitely established as business frontage and that development as such so definitely committed to business that the determination of the council in placing the same in "B" zone had no justification whatever by any of the circumstances and could not be regarded as having any relationship whatever to the general welfare. It would be difficult in the extreme to regard such matters in the argument as establishing error on the part of the Supreme Court of this state when a reading of its decision makes apparent the fact that it gave the closest and most faithful consideration to the facts as contained in the record before it.

Of the undeveloped character of this portion of Wilshire boulevard, the Supreme Court of California, in the instant case, stated:

"The report of the referee that the region along said boulevard which had been included in Zone 'B' was largely unoccupied territory, there being within that area but one store building used for a grocery store and market erected prior to the inclusion of the tract in Zone 'B,' and few real estate offices and one oil station, shows that the region was not unsuitable for residential purposes." [R. 65.]

This is manifestly correct and free from error.

The zoning ordinance was applied to a new and westerly prolongation of the said boulevard. Its development easterly of Rimpau avenue was a matter of important consideration in prejudging the character of the development of the newer portion westerly of Rimpau avenue, and a strong circumstance negativing the assertion of counsel that the trend of development along the last mentioned portion of Wilshire boulevard was to business. The findings disclose:

"That there are on said Wilshire boulevard in the course of construction at the present time easterly of said Rimpau boulevard four or five large apartment houses." [R. 52.]

And, furthermore:

"That Wilshire boulevard easterly from Rimpau for a distance of approximately three miles was originally built up with high class residences." [R. 52.]

These and abundant other circumstances indicate the propriety of the legislative action and the soundness of the court's conclusion sustaining the action.

It has been said in numerous cases that the courts are loath to substitute their judgment as to the necessity for a particular enactment for the legislative judgment exercised in relation to the police power. In this respect a large discretion is vested in the legislative branch of the government. It is only when it is palpable that the measure in controversy has no real or substantial relation to the public health, safety, morals or general welfare, that it will be nullified by the courts.

See:

Building Inspector of Lowell v. Stoklosa, 145 N. E. 262;

Cusack v. Chicago, supra, 529;

Jacobson v. Massachusetts, 197 U. S. 11, 30.

This court, in *Village of Euclid v. Ambler Realty Co., supra*, cited with approval the statement of the court in *State v. City of New Orleans*, 154 La. 271, that:

> "If the municipal council deemed any of the reasons which have been suggested or any other substantial reason a sufficient reason for adopting the ordinance in question, it is not the province of the courts to take issue with the council. We have nothing to do with the question of the wisdom or good policy of municipal ordinances. If they are not satisfactory to a majority of the citizens, their recourse is to the ballot—not the courts."

Counsel site a long excerpt from the opinion in the instant case, rendered by the District Court of Appeal of California, the decision being written by the Honorable Presiding Justice Conrey. This decision was set aside by the Supreme Court of California upon transfer, and following a hearing by said last mentioned court, the

decision was rendered from which a writ of error was taken to this Honorable Court. We express the highest respect for the learned justice who wrote that decision, and for the justices who concurred therein. Said decision, however, has been completely overruled by a higher tribunal and at this date is valuable, if at all, as indicating the growth of a broader and more favorable judicial understanding toward the principles of comprehensive zoning.

We believe we may regard this circumstance in much the same manner as this Honorable Court, in *Village of Euclid v. Ambler Realty Co., supra,* p. 177, regarded the circumstance of the reversal of *State ex rel Houghton,* 164 Minn. 146, by the Supreme Court of Minnesota, it being stated:

> "As evidence of the decided trend toward the broader view, it is significant that in some instances the state courts in later decisions have reversed their former decisions holding the other way. For example, compare State *ex rel.* v. Houghton, *supra,* sustaining the power, with State *ex rel* Lachtman v. Houghton, 134 Minn. 226; State *ex rel.* Roerig v. City of Minneapolis, 136 Minn. 479; and Vorlander v. Hokenson, 45 Minn. 484, denying it, all of which are disapproved in the Houghton case (p. 151) last decided."

Considerations Which Sustain the Conclusion That the Supreme Court of California Was Not in Error in Deciding That the Ordinances Were Neither Unjust nor Discriminatory.

Plaintiffs in error, in conclusion, assail the ordinance as unjust and discriminatory and allege that it imposes

unconscionable burdens upon plaintiffs in error while conferring special privileges upon other owners of property.

Three grounds are specified, viz.:

First: That property fronting on La Brea avenue which intersects Wilshire boulevard at right angles a few blocks easterly of the property of plaintiffs in error, is zoned for business.

Second: That Pico street, which lies parallel with Wilshire boulevard, about one mile southerly thereof, and runs through the same general territory, is likewise zoned for business.

Third: That Wilshire boulevard at the intersection of La Brea avenue, and at the intersection of Western avenue further east, and at the intersection of Vermont avenue, is zoned for business.

The entire argument of plaintiffs in error in support of the several grounds specified, consists largely in the expression of a difference of opinion in construing the facts, varying from that expressed by the court in approving the council's action, and hence the process of pointing out error consists largely of taking issue with the conclusions of the court in respect to disputable issues of fact. The council is vested with the authority to judge in such matters and this court cannot be called upon to act as a final arbiter by the process of questioning or debating its conclusions.

Of the first of the objections, it is at once apparent that under the plan of zoning adopted La Brea avenue intersecting Wilshire boulevard at right angles was selected and zoned to "C" zone or business uses as best suited to care for the needs of the district, in the same manner as Western avenue and Vermont avenue one and two

miles respectively to the east and intersecting Wilshire boulevard, had been laid out. A sufficient justification for this action is contained in the decision wherein it is said:

"We are of the opinion that the placing of these properties in Zone 'C' is supported by valid reasons. With reference to the contention that it was unreasonable to zone La Brea avenue for business uses and Wilshire boulevard for residential uses, it appears from the report of the referee that at convenient intervals along Wilshire boulevard, streets intersecting Wilshire boulevard at right angles have been zoned for business. Thus Vermont avenue, which is approximately three miles from La Brea avenue and Western avenue which is approximately two miles from La Brea avenue, have been zoned to business uses. This was done in order to serve the business needs of the adjacent residential territory. It was therefore but natural and logical in the carrying out of a harmonious plan that the council should zone La Brea avenue for business purposes since it was a main thoroughfare crossing Wilshire boulevard at right angles and was approximately two miles from Western avenue. There was thus provided at convenient and reasonable intervals adequate and convenient business districts 'to serve the reasonable immediate needs of each particular neighborhood.'" (Ware v. City of Wichita, *supra.*) [R. 65.]

Plaintiffs in error cannot be heard to complain that their property might be used for business purposes, or that it is as well adapted for business as property on La Brea avenue placed in Zone "C." The state court,

in replying to this objection, accurately voiced the settled principles of law governing this, saying:

"In this situation it may not be said that the ordinance is void for the reason that petitioners' property is zoned for residential uses, whereas business structures are permitted in other localities within the city similarly circumstanced as the property of the petitioners. As was stated in *Brown v. City of Los Angeles,* 183 Cal. 783 (192 Pac. 716): 'The mere fact that outside of the * * * district there was other property similar in nature and character would not justify the court upon ascertaining that fact to substitute its judgment for the legislative judgment. The boundary line of a district must always be more or less arbitrary, for the property on one side of the line cannot, in the nature of things, be very different from that immediately on the other side of the line.' (See, also, Hadacheck v. Los Angeles, 165 Cal. 416 (L. R. A. 1916B, 1248, 132 Pac. 584).)

"Thus viewed, the ordinance in the instant case is not an arbitrary attempt of the city authorities to discriminate between the uses of property in one territory and the use of property permitted in another of similar description, but, on the contrary, the districts created by the ordinance and its various amendments appear to be established by a rational general rule." [R. 66-67.]

This argument is applicable with equal force to the second objection that Pico street, lying parallel and about a mile to the south of Wilshire boulevard, was zoned to business uses.

Some of the additional considerations indicating the propriety of this legislative action are indicated by evidence in the record to the effect that Pico street contained a double track street car line almost to Rimpau avenue, that it was built up to business by natural de-

velopment as far west as said Rimpau avenue, and that beyond that point it was laid out through an area lower than Wilshire boulevard and hence less attractive for residential and more suitable for business uses. [R. 66.] Under these circumstances it is entirely reasonable that the council deemed it a street better suited for the future development of business, continuing westward the already developed business portion thereof.

As was said in *Village of Euclid v. Ambler Realty Company, supra:*

> "Its governing authorities, presumably representing a majority of its inhabitants and voicing their will, have determined, not that industrial development shall cease at its boundaries, but that the course of such development shall proceed within definitely fixed lines."

As to this second objection, there could be no error in the determination of the state court that:

"As to the contention that discrimination was shown by the council in placing Pico street in Zone 'C,' the findings of the referee show that Pico street is well adapted for business, for the reason that it runs through a lower and less attractive territory than Wilshire boulevard and is served by a double street car line." [R. 66.]

The final objection alleged to establish discrimination, in that Wilshire boulevard at the intersection of La Brea avenue, at the intersection of Western avenue further east and at the intersection of Vermont avenue was zoned for business, is in effect answered by the preceding reply argument. It cannot be successfully maintained that it destroyed a consistent and harmonious zoning treatment of Wilshire boulevard or indicated

the conclusion that there was a purpose or intent in the legislative mind to discriminate in this manner against some property owners on Wilshire boulevard by favoring others in the matter of zone classification. The treatment of Wilshire frontage where immediately contiguous to the lands of intersecting business streets, presented a practical problem and in each instance was given a uniform consideration. In other words, it appeared unreasonable to classify to "B" and "C" uses, lands within the same block and immediately adjoining. Therefore, at such intersections frontage on Wilshire boulevard, on either side of the intersection, was given a like "C" zone classification extending to the next cross street, which thus formed a definite boundary separating the districts. The consistency of this procedure was clearly perceived by the State Supreme Court and aptly expressed in this manner:

"It is apparent that the reason for the inclusion of two blocks in Wilshire boulevard where La Brea avenue intersects it in Zone 'C' was to avoid a situation which would otherwise have resulted in placing business property and residential property within the same block. In short, it was thus zoned in order that residential uses on Wilshire boulevard would not be forced to abut upon business uses on La Brea avenue." [R. 66.]

The general deduction of the court confirming the reasonableness of the ordinance, which we hereafter cite, is accurate and not subject to be assailed as error. It held:

"Thus viewed, the ordinance in the instant case is not an arbitrary attempt of the city authorities to discriminate between the uses of property in one territory and

the use of property permitted in another of similar description, but, on the contrary, the districts created by the ordinance and its various amendments appear to be established by a rational general rule." [R. 66.]

Any one of many reasons pointed out by the state court is sufficient to justify the action of the council as against the indictment that the ordinance is unreasonable and discriminatory, and its exercise of power in this manner cannot be successfully attacked by counsel by taking issue with the judgment of that body. As we read the decision and understand it, the Supreme Court of California undertook only to point out some of the basic factors sustaining the action of the council, without necessarily attempting to point out all the reasons.

Counsel, as we have hereinbefore pointed out, must assume the burden of showing that the action of the council was so extreme and so at variance with the facts and the circumstances, and had so little relationship to considerations of general welfare, that its action could not be justified upon any theory pertaining to the police power. Then, and only in that event, could the court conclude that as a matter of law it had exceeded its jurisdiction and forbid it from exerting its governmental functions. The many circumstances discussed by the court, which we have pointed out in this reply, forbid any such conclusion.

Reference is made by plaintiffs in error to a report from a committee of the council, subsequent to the enactment of said ordinance, relating to an attempt to bring about a change of the use classification on Wilshire boulevard. This is construed by counsel as indicating that the council in originally zoning this portion

of the boulevard was actuated by aesthetic motives. These matters pertain entirely to an effort subsequent to the enactment of the ordinance, to induce the council to change its conclusions, and its refusal, based upon the recommendations of a committee thereof, is interpreted by plaintiffs in error as an admission by indirection that the character of zoning applied was in furtherance and aid of a plan to preserve it as a show street. It may be conceded that aesthetic reasons alone will not justify an exercise of the police power. But by the same token even assuming the council acted upon such motives, which is not the fact, the action of the legislative body giving expression to this function of government cannot be destroyed or rendered void by assailing its motives, if the regulation imposed be shown to bear a real and outstanding relation to the purposes which justify the exercise of the power. This is the test repeatedly laid down by the courts. As was stated in *Goytino v. McAleer*, 4 Cal. App. 655, the courts will not inquire into the motives that prompted the exercise of the discretionary power of a municipal legislative body. The many reasons pointed out in this brief abundantly justify the regulations of the ordinance in question. Certainly, counsel cannot be heard to construe the report in question in such manner as to impeach the action of the council taken long prior thereto.

The reasons which we have hereinbefore presented, as well as those that appear in the decision of the State Supreme Court, amply sustain and justify the council in zoning the property of plaintiffs in error to "B" uses, and it must be presumed that the council, in the enactment of the ordinance in question, had all of these

matters before it, and that it considered every circumstance that it should have considered as justifying and authorizing it to enact this particular ordinance.

We respectfully submit that no error was committed by the said Supreme Court in affirming the constitutionality and reasonableness of said zoning ordinance and the amendment thereof, that the plaintiffs in error have failed in every respect to sustain their claims of error assigned in this proceeding, and that the writ addressed to this Honorable Court should be denied.

Respectfully submitted,

JESS E. STEPHENS,
City Attorney,

LUCIUS P. GREEN,
Assistant City Attorney,

Attorneys for Defendant in Error.